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No. A-62

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANDERSON COUNTY, TENNESSEE
and
STATE BOARD OF EQUALIZATION OF TENNESSEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 84-5026

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDERSON COUNTY, TENNESSEE; DAVID O. BOLLING, ANDERSON COUNTY EXECUTIVE; PATSY STAIR, ANDERSON COUNTY TRUSTEE; OWEN RICHARDSON, ANDERSON COUNTY PROPERTY ASSESSOR; CLYDE CLAIBORNE; ROBERT JOLLEY; JERRY GEORGE; EVERETT SHARP; CHARLOTTE HAYES; HELEN NORMAN; ERNIE PHILLIPS, O. V. LEINHART; KENNETH WALLACE; DARELL COPELAND; JIM HACKWORTH; JACK KEENEY & JACK RAINES, COUNTY COMMISSIONERS; CHARLES OLDHAM; K. E. JONES; R. R. TIPPY; HAPPY YOUNG & TOM F. MULLINX, ANDERSON COUNTY BOARD OF EQUALIZATION; THE BOARD OF EQUALIZATION OF THE STATE OF TENNESSEE AND LAMAR ALEXANDER; GENTRY CROWELL; WILLIAM C. KOCH, JR.; WILLIAM SNODGRASS; HARLAN MATTHEWS; CLAUDE RAMSEY; MARTHA OLSEN AND JOHN E. SLOAN, JR.,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed May 10, 1985

Before ENGEL, KEITH and JONES, Circuit Judges.

KEITH, Circuit Judge. This is an appeal brought on behalf of Anderson County, Tennessee and the Tennessee State Board of Equalization from a reported decision of the United States District Court for the Eastern District of Tennessee. *See United States* v. *Anderson County, Tennessee*, 575 F. Supp. 574 (E.D. Tenn. 1983). This case concerns the propriety of the imposition of an *ad valorem* real property tax against the Union Carbide Corporation on account of an alleged real property interest in the federally-owned Oak Ridge Reservation. For the reasons set forth below, the decision of the district court, granting summary judgment in favor of the United States, is hereby affirmed.

FACTS

The United States, through the Department of Energy (DOE) owns 37,185 acres of land in Anderson and Roane Counties, on which government-owned production and research facilities are located. The property was acquired in 1943 and the facilities have continuously performed functions relating to the development of nuclear energy and the production of nuclear weapons components for the national defense. The Y-12 Plant is located on approximately 805 acres in Anderson County and consists of 271 buildings and structures, all of which are owned in fee simple by the United States.

In 1946, Congress authorized the Atomic Energy Commission (the predecessor of DOE) to contract with private and public entities for the research and development of nuclear processes, utilizing government facilities. Union Carbide has operated the Y-12 Plant pursuant to a management contract which authorizes it to manage, operate and maintain the fa-

cility in accordance with the directions of the Department of Energy. Union Carbide procures materials, supplies and equipment, although DOE retains the right to furnish any of these items. Payment for such purchases is made by Carbide from funds provided by the government, and title passes directly from the vendor to the government.

Union Carbide performs all the work under the contract with its own employees who numbered approximately 7,000 at the time of this litigation. Union Carbide has no capital investment in the Y-12 Plant. The contract costs include all expenditures under the contract, including the salaries of Carbide employees. In fiscal year 1980, the allowable costs totaled $272,642,000. In addition to the allowable costs under the contract, Carbide receives a negotiated fee for operating, managing and maintaining three industrial facilities, one of which is the Y-12 Plant. It was estimated that Carbide received $1,800,000 for its work at the Y-12 Plant in 1980. The fee is unrelated to the value of the real or personal property managed or to the amount of weapon components produced. Union Carbide performs no work as a private entrepreneur on behalf of itself or any other private entity at the Y-12 Plant. Union Carbide is not obligated to pay any rent, fee or other consideration in exchange for its presence at, and right of access to, the Y-12 Plant for the purpose of performing its duties under the management contract. The Department of Energy can terminate the contract for any reason upon six months notice.

The contractual relationship is reviewed periodically in accordance with applicable agency regulations. Each review since 1943 has resulted in an extension of Union Carbide's contract. However, effective April 1, 1984, Union Carbide severed its contractual relationship with DOE and was replaced as management contractor by the Martin Marietta Corporation.

HISTORY OF LITIGATION

In 1980, Anderson County advised both the United States and Union Carbide that it was going to assess an *ad valorem* real property tax against Union Carbide because of an alleged interest in real property consisting of Carbide's possession and use of the federally-owned Y-12 Plant. The United States sought to contest the validity of this tax and filed suit in the United States District Court for the Eastern District of Tennessee. However, on July 23, 1980, the district court ordered the parties to present their claims to the County and State Boards of Equalization. Subsequently, this initial federal action was dismissed.

Union Carbide appealed the tax assessment to the Anderson County Board of Equalization. On September 30, 1980, the Anderson County Board of Equalization ruled that the property tax on Union Carbide's interest in the Y-12 Plant was legal and appraised that interest at $370,000,000. Union Carbide then appealed to the state Assessment Appeals Commission. On June 10, 1981, the Assessment Appeals Commission reversed the Anderson County Board of Equalization, holding that Union Carbide had no taxable interest in the Y-12 Plant.

Anderson County appealed this ruling to the State Board of Equalization. On January 8, 1982, in a 4-3 decision, the State Board reversed the decision of the Assessment Appeals Commission and found that, under Tennessee law, Carbide was the owner of a real property interest in the Y-12 Plant.

Union Carbide sought review of the State Board's ruling in the Chancery Court for Davidson County. On February 2, 1983, the chancellor affirmed the decision of the State Board of Equalization and found that Carbide enjoyed two significant rights in the Y-12 Plant: the right to use it and the right to enter or leave it.

While the case was pending in the chancery court, the United States initiated a second declaratory judgment action in the United States District Court for the Eastern District

of Tennessee, seeking to invalidate the tax assessment imposed against Union Carbide. The district court found that Union Carbide's pending parallel action in chancery court related to important and unsettled matters of state law. *United States* v. *Anderson County, Tennessee*, 547 F.Supp. 18, 19 (E.D. Tenn. 1982), *rev'd*, 705 F.2d 184 (6th Cir. *cert. denied*, 104 S.Ct. 548 (1983). Accordingly, on April 15, 1982, the district court invoked the doctrine of abstention and dismissed the government's federal court action. 547 F.Supp. at 20.

The United States appealed the dismissal to this Court. This Court determined that abstention was inappropriate because there were no unsettled questions of Tennessee law as the relevant statutes were "clear in imposing an ad valorem tax on real property interests and need no judicial construction." 705 F.2d at 187. Further, this Court noted that the unsettled question before the district court was "whether the contractual relationship between Union Carbide and the United States conveyed to Union Carbide *any* real property interest in the Y-12 Plant" and that the "interpretation of a contract wherein the United States is a party is a *federal issue*." 705 F.2d at 187 (emphasis in the original). Accordingly, on April 20, 1983, this Court reversed and remanded the case to the district court.

Thereafter, on November 9, 1983, the district court entered an order and opinion granting summary judgment in favor of the United States. *United States* v. *Anderson County, Tennessee*, 575 F.Supp. 574 (E.D. Tenn. 1983). In granting judgment in favor of the government, the district court held that the contract between the United States and Union Carbide did not grant Carbide a leasehold or other traditional real property interest in the Y-12 Plant. *See* 575 F.Supp. at 578 Rather, the district court was convinced that Union Carbide's interest only amounted to a "mere license" to use the Y-12 Plant in fulfilling its contract with the government. *Id.* Further, the district court reasoned that the Tennessee statute

was only designed to tax "that which is traditionally defined as an interest in real property." Thus, the court concluded that Anderson County could not tax Union Carbide under the Tennessee *ad valorem* real property tax statute, since, under Tennessee law, Carbide's interest in the Y-12 Plant was not real property. *Id.*

Anderson County now appeals the November 9, 1983 decision of the district court. However, subsequent to the district court's decision, two important opinions were filed by Tennessee appellate courts in Union Carbide's parallel state court litigation. On December 22, 1983, the Tennessee Court of Appeals held that Union Carbide's right to use, enter and leave the Y-12 Plant is not a taxable interest under Tennessee Code Annotation Section 67-5-502(6).[1] *Union Carbide Corp.* v. *Alexander*, slip op. at 9 (Tenn. Ct. App. Dec. 22, 1983), *aff'd*, 679 S.W.2d 938 (Tenn. 1984).

The Court of Appeals concluded that it was bound by the district court's finding that the contract granted a license to Union Carbide, since the interpretation of a contract to which the United States is a party is a federal question. The Court of Appeals, however, recognized that it was not bound by the district court's finding that the interest of Union Carbide was not taxable, since the state courts of Tennessee are the ultimate interpreters of Tennessee statutes. *Id.* at 6. Nevertheless, the Court of Appeals agreed with the district court that the interest was not taxable. The Court of Appeals stated:

---

[1] This statute provides:

> The function of assessment shall be as follows, to wit:
>
> . . . .
>
> (6) All mineral interests and all other interests of whatsoever character, not defined as products of the soil, in real property, including the interest which the lessee may have in and to the improvements erected upon land where the fee, reversion, or remainder therein is exempt to the owner, and which said interest or interests is or are owned separate from the general freehold, shall be assessed to the owner thereof, separately from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real property.

> [W]e are unable to find any instance in which a property tax has been imposed unless the entity being taxed had some incident of ownership traditionally recognized as valid under the law. The mere use by Carbide of the real property for purposes of performing the contract does not amount to an incident of ownership.

Id. at 9. Thus, the Court of Appeals, holding that the interest of Carbide was not taxable, reversed the decision of the chancellor and the State Board of Equalization and affirmed the decision of the Assessment Appeals Commission.

Subsequently, on November 5, 1984, the Tennessee Supreme Court affirmed the decision of the Court of Appeals. *Union Carbide Corp.* v. *Alexander*, 679 S.W.2d 938 (Tenn. 1984). In a well reasoned opinion, the Tennessee Supreme Court held as a matter of state law:

> We do not believe that the right to use and the right to enter and leave are sufficient to allow Anderson County to claim that Carbide has a real property interest in the Y-12 Plant. . . . Carbide has no interest under the contract that it can sell, lease, or otherwise transfer. The mere use by Carbide of the real property for purposes of performing the contract does not amount to an incident of ownership.

679 S.W.2d at 940-41. Further, the Tennessee Supreme Court noted:

> Defendants [Anderson County] maintain that Tennessee's ad valorem property tax statutes, T.C.A. § 67-5-501 et seq., place a tax on possessory interests in real estate like those enjoyed by Union Carbide. We cannot agree. . . . Without some clear indication of legislative intent to the contrary, we are unable to say Carbide has a taxable interest in the Y-12 Plant under T.C.A. § 67-5-501 et seq.

679 S.W.2d at 942.

DISCUSSION

Having developed the extensive history of the prior litigation in this matter, it would seem that subsequent to the decision of the Tennessee Supreme Court there is relatively little left for this Court to decide. In essence, we understand Anderson County to present three arguments for reversal:

> 1) The district court's decision should be reversed because the court failed to recognize that, as a matter of Tennessee law, the rights conveyed to Union Carbide pursuant to its federal management contract constituted a real property interest;
>
> 2) The district court's decision should be reversed because the court failed to recognize that, as a matter of Tennessee law, this alleged real property interest was taxable;
>
> 3) The district court's decision should be reversed because Union Carbide's declaration, in a proceeding before the California Franchise Tax Board and State Board of Equalization, that it has exclusive possession and use of the Y-12 Plant was an admission chargeable against the United States which effectively undermines the rationale of the decision.

We address first the argument that under Tennessee law Union Carbide's use and possession of the Y-12 Plant constitutes a real property interest. As was discussed above, the Tennessee Supreme Court has definitively ruled that, under Tennessee law, Union Carbide does not have a real property interest in the Y-12 Plant. *See Union Carbide Corp.* v. *Alexander*, 679 S.W.2d at 940-41 ("We do not believe that the right to use and the right to enter and leave are sufficient to allow Anderson County to claim that Carbide has a real property interest in the Y-12 Plant."). Further, in reaching this decision, the Tennessee Supreme Court made it clear that this ruling was based upon its assessment of the interest Car-

bide had in the use of the Y-12 Plant, and not the district court's alleged misapplication of common law concepts. 679 S.W.2d at 941 ("Whether or not Carbide has a taxable interest is not dependent on the common law label that we attach to this interest.").

Under the *Erie* doctrine, a federal court sitting in diversity is obligated to apply the substantive law of the forum state. *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 78 (1938). Further, "until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law . . . in accordance with the then controlling decision of the highest state court." *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941). Thus we find no merit in the argument of Anderson County concerning Carbide's alleged real property interest in the Y-12 Plant.

Next, we address the argument that under Tennessee law Union Carbide's alleged real property interest is taxable. As was also discussed above, the Tennessee Supreme Court has ruled that Anderson County cannot tax Carbide's interest in the Y-12 Plant under the current statute. *Union Carbide Corp.* v. *Alexander*, 679 S.W.2d at 942 ("Without some clear indication of legislative intent to the contrary ,we are unable to say Carbide has a taxable interest in the Y-12 Plant under T.C.A. § 67-5-501 et seq."). Since this ruling on state law is also binding on this Court, we find no merit in the argument of Anderson County concerning the taxability of Carbide's interest in the Y-12 Plant.

Last, we address the argument that Union Carbide's claim, in a California state franchise tax proceeding, of exclusive use and possession of the Y-12 Plant is an admission chargeable against the United States, which so undermines the reasoning of the district court as to require reversal of its decision. Since this argument is founded upon recent developments which did not come to the attention of the parties until after the pleadings for this appeal had been submitted, we will treat

this argument in detail.[2] In essence, Anderson County contends: that the central issue before the district court was whether Union Carbide was entitled to exclusive possession of the Y-12 Plant; that the district court's conclusion that Carbide did not have a taxable real property interest was premised upon the finding of a lack of exclusive possession; that this finding was clearly erroneous as evidenced by Carbide's declaration to the California Franchise Tax Board and State Board of Equalization that it had exclusive use and possession of the property; that Carbide's declaration is an admission chargeable against the United States and thus admissible in this action; and, therefore, this Court should reverse the decision of the district court, or at least remand the case to the district court for consideration of this evidence. We do not agree.

Assuming, *arguendo*, the United States could be bound by Carbide's declaration of exclusive use and possession before the California taxing authorities, *cf. Krebs Pigment & Chemical Co.* v. *Sheridan*, 79 F.2d 479, 480 (3d Cir. 1935), we find that this statement simply does not undermine the holding of the district court or the Tennessee Supreme Court that Carbide's interest in the Y-12 Plant is not properly taxable under the Tennessee *ad valorem* real property tax statute. Contrary to Anderson County's reading of the district court's opinion, the critical issue in this entire litigation has always been whether Union Carbide owns an interest in the real property at the Y-12 Plant separate from the ownership of the

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[2] On December 20, 1984, counsel for Anderson County submitted, by mail, a Supplemental Statement for Appellants. This supplemental statement was duly filed on December 26, 1984, and transmitted to the panel members prior to the oral argument of this case. This supplemental statement has been the subject of various posthearing motions filed by Anderson County. *E.g.*, Appellant's Motion for Judicial Notice (filed Jan. 18, 1985). This Court has denied those posthearing motions. However, since the December 20 supplemental statement is a part of the record before us, the Court will address the relevant portion of Anderson County's statement as a citation to supplemental authorities. *See* Fed.R.App.P. 28(j).

United States. *Union Carbide Corp.* v. *Alexander*, 679 S.W. 2d at 939; *accord United States* v. *Anderson County, Tennessee*, 575 F.Supp. at 575 (the question before the court is "whether the [c]ontract conveyed to Union Carbide any real property interest in the Y-12 facility"). Subsequent to the district court's decision, the Tennessee Supreme Court parsed through the common law labels and determined that the interest represented by Carbide's use of the Y-12 Plant did not amount to an incident of ownership. 679 S.W.2d at 941. Further, the Tennessee Supreme Court determined that the interest Carbide had in the Y-12 Plant was not properly taxable under the relevant Tennessee statute. 679 S.W.2d at 942.

Given these definitive rulings by the Tennessee Supreme Court on the application of Tennessee law to the precise question at bar, the proceedings or pleadings before the California Franchise Tax Board are simply not material. Thus, we find no merit in the argument of Anderson County concerning the effect of Union Carbide's claim in California to exclusive use and possession of the Y-12 Plant.

CONCLUSION

It is an established principle of law that a reviewing court can sustain the judgment of a lower court on any ground that finds support in the record. *See Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957); *Scivally* v. *Time Insurance Co.*, 724 F.2d 101, 103 (10th Cir. 1983); *Stockton* v. *Lucas*, 482 F.2d 979, 985 (Temp. Emer. Ct. App. 1973). Given that this Court has available to it the controlling decision of the Tennessee Supreme Court on the issues of Tennessee law raised by this appeal, we expressly base our affirmance on the decision of that court. Accordingly, the judgment of the Honorable Robert L. Taylor of the United States District Court for the Eastern District of Tennessee is hereby affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. TENNESSEE, N.D.

November 9, 1983

UNITED STATES OF AMERICA

v.

ANDERSON COUNTY, TENNESSEE
et al.

Civ. No. 3-82-83.

MEMORANDUM

ROBERT L. TAYLOR, Chief Judge.

The United States brought this action seeking a declaration that a state property tax imposed upon a government contractor is invalid. The case is now before the Court on cross motions for summary judgment.

The United States owns in fee simple approximately 811 acres and 300 buildings and structures in Anderson County, Tennessee. This property is known as the Y-12 Plant which is part of an integrated system of federally owned laboratories and plants operated by the United States Department of Energy [DOE] to develop and produce nuclear weapons for national defense. Union Carbide runs Y-12 for DOE pursuant to Government Contract No. W-7405-ENG-26 [Contract]. Defendants contend that the Contract gave Union Carbide a real property interest as defined by Tenn. Code Ann. § 67-601(1) to which a real property tax attached pursuant to Tenn. Code Ann. § 67-602.

Tennessee Code Annotated § 67-601(1) defines real property "to include lands, tenements, hereditaments, structures, improvements; moveable property assessable under § 67-612; or machinery and equipment affixed to realty (except as otherwise provided for herein) and all rights thereto and interests therein, equitable as well as legal." Section 67-602 provides:

> The function of assessment shall be as follows, to wit:
>
> . . . .
>
> (6) All mineral interests and all other interests of whatsoever character, not defined as products of the soil, in real property, including the interest which the lessee may have in and to the improvements erected upon land where the fee, reversion, or remainder therein is exempt to the owner, and which said interest or interests is or are owned separate from the general freehold, shall be assessed to the owner thereof, separately from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real property.

The Court understands these Tennessee statutes to mean that Tennessee intends to tax *any* interest in real property. *See United States v. Anderson County, Tennessee,* 705 F.2d 184, 187 (6th Cir. 1983).

Although Tennessee law defines real property, whether the Contract conveyed any real property to Union Carbide is a question of federal law. 705 F.2d at 187, *citing United States v. Allegheny County,* 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209 (1977). The questions before the Court are: 1) whether the Contract conveyed to Union Carbide any real property interest in the Y-12 facility, and if so, 2) whether the Supremacy Clause of the United States Constitution prohibits Tennessee from imposing a property tax on Union Carbide.

Pursuant to a series of continual contracts, Union Carbide has run Y-12 for the federal government since 1947. The last contract defining this relationship was scheduled to expire on September 30, 1983. Union Carbide did not renew the Contract but the parties have extended the Contract to April 1, 1984.

The stated purpose of the Contract is for Union Carbide to manage and operate Y-12. For its services, Union Carbide receives an annual fixed fee plus costs. The fee is unrelated to the value of Y-12. The Contract does not expressly convey to Union Carbide a lease, easement, license, privilege, franchise or any property interest in Y-12. The Contract provides that title to all property in the care and custody or possession of Union Carbide in connection with the Contract will remain vested with the government. Union Carbide is required to reasonably care for all government property under its control at Y-12. The Contract calls for Union Carbide to maintain guard and fire-fighting forces at Y-12. Union Carbide, however, is not liable for loss or damage to government property unless such loss or damage is the result of willful misconduct, bad faith or failure to reasonably comply with DOE directives.

The cost of operating Y-12 is borne by the United States. Union Carbide uses none of its property or funds to operate Y-12. The Contract calls for the use of "advance funding" in which Union Carbide pays creditors from a government account. *See United States v. New Mexico,* 455 U.S. 720, 725-27, 102 S. Ct. 1373, 1377-78, 71 L. Ed. 2d 580 (1982). DOE, however, has retained the right to make direct payments to creditors. Under the advanced funding procedure, title to property purchased by Union Carbide for the operation of Y-12 passes directly from the supplier to the government. *Id.*

Union Carbide performs only government work at Y-12. "Union Carbide performs no work as a private entrepreneur on behalf of itself or any other private entity at the Y-12 Plant." 705 F.2d at 185. With limited exception, all technical data produced at Y-12 becomes the property of the United States. Union Carbide may reserve the right to use any invention it develops at Y-12 for its own private use; however, the government obtains the patent rights to any invention developed at Y-12.

At the time this litigation began there were 7,109 Union Carbide employees and 90 government employees at Y-12. DOE retains the right to inspect Union Carbide's work at any time and any manner it deems appropriate.

The Contract also provides that DOE may terminate the Contract if Union Carbide defaults in performance or "whenever, but upon not less than six (6) months days [sic] prior written notice to [Union Carbide], for any reason DOE shall determine any such termination is for the best interest of the Government." Contract Art. VIII(a)(1) (the Court assumes that six *months* prior notice is required for termination absent default). Union Carbide may terminate the Contract upon one year's notice. Any termination of the Contract would be without prejudice to any claims that either party would have against the other.

A contract between a corporation and the United States government is to be construed and the rights of the parties are to be determined by the application of the same principles of law applicable to contracts between private individuals. *Reading Steel Casting Co. v. United States,* 268 U.S. 186, 188, 45 S. Ct. 469, 470, 69 L. Ed. 2d 907 (1925). The principles of general contract law apply to government contracts. *Priebe & Sons v. United States,* 332 U.S. 407, 411, 68 S. Ct. 123, 125, 92 L. Ed. 32 (1947). Considered in whole and in part, the Court finds nothing ambiguous or confusing about the rights and obligations of this Contract.

In such cases, the contract language itself reveals the intent of the parties, and rules of construction need not be considered. *See, e.g., Pavlik v. Consolidation Coal Co.*, 456 F.2d 378 (6th Cir. 1972). *See generally*, 3 Williston on Contracts § 609 (revised edition, 1936). In determining what interest Union Carbide may have in Y-12, however, the Court is not bound by the terminology used by the parties to the Contract. Union Carbide and the United States have a history of resisting state taxes levied on Y-12. *See, Carson v. Roane-Anderson Co.*, 342 U.S. 232, 72 S. Ct. 257, 96 L. Ed. 257 (1952); *United States v. Boyd*, 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. 2d 713 (1964). It would be clearly unfair to allow Union Carbide to avoid a tax if the United States granted Union Carbide a real property interest, but simply did not label it a real property interest.

A contractor with a similar government contract for the operation of the Rocky Flats Plant has been held not subject to a Colorado property tax. *United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), *aff'd without opinion sub nom.*, 450 U.S. 901, 101 S. Ct. 1335, 67 L. Ed. 2d 325 (1981). In that case, however, Colorado was attempting to tax the contractor for the full value of the property. The federal government clearly retained some real property interest in Rocky Flats. Accordingly, a tax on the full value of the property would be at least a partial tax on the United States. The Tenth Circuit concluded that the substance of the Colorado tax was not to tax the contractor's use of government property, "but to lay an ad valorem general property tax on property owned by the United States." *Id.* at 221. Although the court stated that the contractor was "merely going onto government property where it perform[ed] its management services," *Id.* at 220, the Tenth Circuit was not presented with the question of whether the contract conveyed a real property interest. Therefore, the *Colorado* decision does not resolve this case.

Defendants recognize that the United States retained a real property interest in Y-12. Accordingly, defendants claim they have not sought to tax Union Carbide for the full value of Y-12. Rather, defendants claim they have sought to segregate the real property interest retained by the United States from the interest conveyed to Union Carbide.

There is an action parallel to this case pending in the Tennessee state courts. Union Carbide has appealed a Chancery Court decision holding that Union Carbide owned a taxable property interest in Y-12. *Union Carbide Corp. v. Alexander,* No. 82-431—III (Davidson County Ch. Feb. 2, 1983). The chancellor correctly determined that Union Carbide had the right to leave and enter and the right to use Y-12. Applying the "bundle of rights" theory of property ownership, the chancellor concluded that Union Carbide did own a property interest in Y-12. The chancellor did not explain, however, why Union Carbide's property interest in Y-12 was a real property interest.

This Court is in agreement with the chancellor when he stated that "[i]t is difficult to apply traditional concepts of property ownership which evolve from a medieval, feudal society to this post-World War II arrangement between the government and a contractor for the manufacture of nuclear weapons." *Id.* at 5. Because the Tennessee tax statutes maintain the distinction between real and personal property, however, this Court must maintain the distinction.

Although Union Carbide has the right to enter, leave and use Y-12, it does not have a leasehold interest in Y-12. Generally, during the existence of a lease, the tenant is the owner of the premises and entitled to exclusive possession. 51 C.J.S. *Landlord and Tenant,* § 202(6). Union Carbide does not have exclusive possession of Y-12. Nowhere in the Contract has DOE given up its right to leave and enter Y-12. Nor has DOE given up its right to use Y-12 for any purpose

that does not conflict with Union Carbide's contractual obligations. DOE has retained the right to inspect the Y-12 operation whenever and however it deems appropriate. Although government employees at Y-12 are far outnumbered by Union Carbide employees, the right to inspect is significant. Moreover, because of the nature of nuclear weapons, it is not unreasonable to expect the government to greatly increase its presence during war, international crisis, or a time when sabotage is experienced or expected. The detailed nature of the contract indicates that DOE retains great control over Union Carbide's operation of Y-12. Union Carbide's management program must be approved by DOE and Union Carbide may not construct, alter or repair any physical structure at Y-12 without DOE permission. The contract does not purport to be a lease "and the control over the business of [Union Carbide] and rights of entry and inspection retained by the owner of the realty are so extensive as to negative any notion that a lease of the realty was intended or effected." *United States v. Taylor's Oak Ridge Corp.*, 89 F. Supp. 28, 30 (E.D. Tenn. 1950).

Admittedly, defendants do not claim that Union Carbide has a leasehold in Y-12. Indeed, defendants never specify what real property interest Union Carbide may have in Y-12. The Court is convinced that Union Carbide's interest is a mere license. "A 'license,' with respect to real estate, is an authority to do a particular act or series of acts on another's land without possessing any estate therein. It is not assignable, and is generally revocable at the will of the licensor." *Barksdale v. Marcum,* 7 Tenn. App. 697, 709, *cert. denied,* (Tenn. 1928) (citation omitted). The Contract in this case provides that "[n]either this contract nor any interest therein nor claim thereunder shall be assigned or transferred by [Union Carbide], except as expressly

authorized in writing by DOE." Contract at Art. XXI. Additionally, Union Carbide's right to use Y-12 is revocable at the will of DOE. Although DOE is required to give six months notice before termination of the Contract, a period of notice before revocation is not inconsistent with a license in real property. *See United States v. Hodge,* 89 F. Supp. 25, 26 (E.D. Tenn. 1949).

A license creates no estate in land and generally is not considered an interest in land. 53 C.J.S. Licenses § 79 (1948); 25 Am. Jur. Easements and Licenses § 123 (1966). *But see,* Restatement of Property § 512 & Comment c (1944). The Court has no reason to believe that Tenn. Code Ann. § 67-601(1) was designed to tax anything other than that which is traditionally defined as an interest in real property. The Court, therefore, concludes that within the meaning of Tennessee's real property tax, Union Carbide has no real property interest in Y-12.

Because the Court concludes that Union Carbide has no real property interest in Y-12, it is not necessary to determine whether the Supremacy Clause of the United States prohibits Tennessee from imposing a property tax on Union Carbide. The Court notes, however, that defendants could tax Union Carbide's use of the Y-12 real property. *United States v. County of Fresno,* 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977). The Court has no reservations concerning a local tax upon Union Carbide. The Court simply does not believe that defendants can tax Union Carbide by way of Tennessee's real property tax since, under Tennessee law, Union Carbide's interest in Y-12 is not a real property interest.

It is therefore ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, granted. It is further ORDERED that defendant's motion for summary judgment be, and the same here is, denied.

Order Accordingly.

APPENDIX C

SUPREME COURT OF TENNESSEE,
AT NASHVILLE.

November 5, 1984.

UNION CARBIDE CORPORATION,
Plaintiff-Appellee,

v,

Lamar ALEXANDER, Gentry Crowell, William C. Koch, Jr., William Snodgrass, Harlan Matthews, Claude Ramsey, Martha Olsen, and John E. Sloan, Jr., each of whom is sued in his official capacity as a Member of the Board of Equalization of the State of Tennessee; **Board of Equalization of the State of Tennessee,** and **Anderson County, Tennessee,**
Defendants-Appellants.

OPINION

DROWOTA, Justice.

We granted Defendants' Rule 11 application to consider the taxability, under Tennessee's real property taxation statutes, T.C.A. § 67-5-501 et seq., of property owned by the United States in Anderson County, Tennessee. Defendants seek to tax a private corporation that manages and operates the Y-12 Plant under a contract with the United States. The specific issue in this case is whether Union Carbide Corporation owns an interest in the real property at the Y-12 Plant separate from the ownership interest of the United States. It is undisputed that the fee interest of the United States is exempt from real property taxation.

The United States, through the Department of Energy (hereinafter DOE) owns 37,185 acres of land in Anderson and Roane Counties, on which government-owned production and research facilities are located. The property was acquired in 1942 and the facilities have been performing functions relating to the development of nuclear energy and the production of nuclear weapons components for the national defense. The Y-12 Plant is located on approximately 805 acres in Anderson County and consists of 271 buildings and structures, all of which are owned in fee simple by the United States.

In 1946 Congress authorized the Atomic Energy Commission (the predecessor of DOE) to contract with private and public entities for the research and development of nuclear processes, utilizing the government's own facilities. The contract pursuant to which Union Carbide has operated the Y-12 Plant is a "Management Contract" which authorizes Plaintiff to manage, operate and maintain the facility in accordance with the directions of the Department of Energy. Union Carbide procures materials, supplies and equipment, although DOE retains the right to furnish any of these items. Payment for such purchases is made by Carbide from funds provided by the government, and title passes directly from the vendor to the government.

Union Carbide performs all the work under the contract with its own employees, which numbered approximately 7,000 at the time of this litigation. Union Carbide has no capital investment in the Y-12 Plant. The contract costs include all expenditures under the contract, including the salaries of Carbide employees. In fiscal year 1980, the allowable costs totaled $272,642,000. In addition to the allowable costs under the contract, Carbide receives a negotiated fee for operating, managing and maintaining three industrial facilities, one of which is the Y-12 Plant. DOE estimates that Carbide received $1.8 million for its work at Y-12 in 1980. DOE can terminate the contract for

any reason upon six months notice. The fee is unrelated to the value of the real or personal property managed or to the amount of weapon components produced. Union Carbide performs no work as a private entrepreneur on behalf of itself or any other private entity at the Y-12 Plant. Union Carbide is not obligated to pay any rent, fee or other consideration in exchange for its presence at, and right of access to, the Y-12 Plant for the purpose of performing its duties under its management contract.

The contractual relationship is reviewed periodically in accordance with applicable agency regulations. Each review has resulted in an extension of the contract. Effective April 1, 1984, Union Carbide decided to sever its contractual relationship with DOE and was replaced by the Martin Marietta Corporation as management contractor.

After Anderson County levied the assessment against Union Carbide, Carbide sought review before the Assessment Appeals Commission. In a unanimous decision, the Commission found that "Carbide does not have a *separate* interest as required by the statute. Accordingly, we can find no interest of Carbide in the plant which rises to the dignity of a taxable interest for ad valorem property tax purposes." The Commission ordered the assessment be stricken in its entirety.

Anderson County appealed this ruling to the State Board of Equalization. The State Board, in a 4-3 decision, reversed the decision of the Assessment Appeals Commission and found that Carbide was the owner of real property as defined by T.C.A. § 67-601(1) [now 67-5-501(9)] and fixed the assessment at $325,000,000.00.

Union Carbide sought review of the Board's ruling in the Chancery Court for Davidson County, pursuant to T.C.A. § 4-5-322. The Chancellor affirmed the decision of the Board of Equalization and found that Carbide enjoyed two significant rights in the Y-12 Plant—the right to use it

and the right to enter or leave it. The Chancellor stated that "Union Carbide Corporation pursuant to contract with the United States does possess a separate property interest under Tennessee law in the Y-12 Plant and . . . this interest is subject to property taxation in Tennessee . . . ."

While this litigation was pending in Chancery Court, the United States sought a declaration in federal court that the real property tax imposed upon Carbide was invalid. Union Carbide was not a party to the suit. The District Court originally abstained, pending resolution of the suit in Chancery Court, but that decision was reversed by the United States Court of Appeals for the Sixth Circuit and the case was remanded to the District Court. *United States v. Anderson County, Tennessee,* 547 F. Supp. 18 (E.D. Tenn. 1982), *rev'd,* 705 F.2d 184 (6th Cir. 1982). On remand, Judge Taylor concluded that Union Carbide's interest in the Y-12 Plant was a "mere license" and was not taxable under Tennessee's real property taxing statutes. 575 F. Supp. 574 (E.D. Tenn. 1983).

The Tennessee Court of Appeals concluded that it was bound by the district court's finding that the contract granted a license to Union Carbide, since the interpretation of a contract to which the United States is a party is a federal question, citing *United States v. Allegheny County,* 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209 (1944). However, the Court of Appeals recognized that it was not bound by the District Court's finding that the interest of Union Carbide was not taxable, since state courts of Tennessee are the interpreters of Tennessee statutes. Nevertheless, the Court of Appeals did agree with the District Court that the interest was not taxable. Speaking for the Court, Judge Lewis stated that "we are unable to find any instance in which a property tax has been imposed unless the entity being taxed had some incident of ownership traditionally recognized as valid under the law. The mere use by Carbide of the real property for purposes of performing the contract does not

amount to an incident of ownership." The Court of Appeals reversed the decisions of the Chancellor and the State Board of Equalization and affirmed the decision of the Assessment Appeals Commission that the interest of Carbide was not taxable.

Defendants argue that Union Carbide has a real property interest in the Y-12 Plant that is separate and distinct from the fee ownership of the United States. They maintain that Carbide has a possessory interest in Y-12 arising from its possession, use, control and enjoyment of real property for purposes of performing its contractual obligations with the United States. Defendants concede that their whole theory turns on the notion of the "bundle of rights." In a property assessment manual (International Association of Assessing Officers, *Property Assessment Valuation* (1977)), it is said that there are six basic rights associated with the ownership of property; (1) the right to use; (2) the right to sell; (3) the right to lease or rent; (4) the right to enter or leave; (5) the right to give away; (6) the right to refuse to do any of these.

The Chancellor found that Carbide had the right to use and the right to enter and leave. It is not disputed that Carbide cannot sell, lease or give away the Y-12 Plant. We do not believe that the right to use and the right to enter and leave are sufficient to allow Anderson County to claim that Carbide has a real property interest in the Y-12 Plant. As the Court of Appeals pointed out, the right to alienate is an important element of ownership. *See* 63 Am. Jur. 2d *Property* § 47 (1972), at 331. Carbide has no interest under the contract that it can sell, lease, or otherwise transfer. The mere use by Carbide of the real property for purposes of performing the contract does not amount to an incident of ownership.

Anderson County argues that the Court of Appeals erred when it concluded that it was bound by the District Court's finding that Carbide's interest was a mere license.

Defendants argue that the Court of Appeals should have reviewed the contract and reached its own conclusion. We do not believe this issue matters in this case. Whether or not Carbide has a taxable interest is not dependent on the common law label that we attach to this interest. We believe the Court of Appeals was correct in determining that Carbide had the right to use and the right to enter and leave the property. It is unnecessary that these rights be translated into a common law label.

Defendants also argue that Carbide is escaping taxation and that this is against public policy. Defendants contend that because Carbide's employees work in a facility exempt from the local property tax, their share of the burdens are transferred to the local taxpayers who do pay local property taxes. Defendants fail to recognize that the federal government was aware of this problem and that Congress passed legislation to alleviate this burden. Two specific statutory provisions address this imbalance: Section 168 of the Atomic Energy Act of 1954, codified at 42 U.S.C. § 2208 (Payments in Lieu of Taxes), and Section 91 of the Atomic Energy Community Act of 1955, codified at 42 U.S.C. § 2391 (Basis of Assistance to Cities and Other State and Local Entities). Section 168 of the Atomic Energy Act of 1954 is especially illustrative:

> In order to render financial assistance to those states and localities in which the activities of the Atomic Energy Commission [now the Department of Energy] are carried on, and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to state and local governments in lieu of *property taxes.*

42 U.S.C. § 2208 (emphasis added).

During the time that Union Carbide has contracted with the United States in Anderson County, the County has received $3,599,401 in Financial Assistance Payments and Payments in Lieu of Taxes. If Anderson County feels that these payments are inadequate, the County's remedy rests with the Secretary of the Department of Energy.

Finally, it is not disputed by Carbide that the Tennessee General Assembly could tax the interests of Union Carbide if it so desired. Other states like California and Michigan have possessory interest and use taxes that could conceivably reach government contractors like Union Carbide. *See United States v. County of Fresno,* 50 Cal. App. 3d 633, 123 Cal. Rptr. 548 (1975), *aff'd,* 429 U.S. 452, 975 S. Ct. 699, 50 L. Ed. 2d 683 (1977), and *City of Detroit v. The Murray Corp.,* 355 U.S. 489, 78 S. Ct. 486, 2 L. Ed. 2d 441 (1958). These cases recognize the distinction between "property" taxes and "privilege" taxes. Justice Harlan has pointed out that

> "a state may not constitutionally tax property owned by the Federal Government, even though the property is in private hands and the tax is to be collected from a private taxpayer, . . . but it may tax activities of private persons, even though these activities involve the use of government property and the value or amount of such property becomes the partial or exclusive basis for the measurement of the tax."

City of Detroit v. The Murray Corp., 355 U.S. 489, 505–506, 78 S. Ct. 486, 492–493, 2 L. Ed. 2d 441, 466–467 (1958) (Harlan, J., concurring) (citations omitted).

Defendants maintain that Tennessee's ad valorem property tax statutes, T.C.A. § 67–5–501 et seq., place a tax on possessory interests in real estate like those enjoyed by Union Carbide. We cannot agree. It is fundamental in this jurisdiction that statutes levying taxes or duties on citizens will not be extended by implication beyond the

clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically named or pointed out. *Chero-Cola Bottling Co. v. McDaniel,* 145 Tenn. 615, 237 S.W. 1101 (1921); *H.D. Watts Co. v. Hauk,* 144 Tenn. 215, 231 S.W. 903 (1923); *Chattanooga Plow Co. v. Hays,* 125 Tenn. 148, 140 S.W. 1068 (1911). Doubts as to the application of tax statutes will be resolved in favor of the citizen and tax statutes will be construed most strongly against the state. *H.D. Watts Co. v. Hauk, supra*; *State v. Louisville & Nashville R. Co.,* 139 Tenn. 406, 201 S.W. 738 (1918).

A tax burden such as that sought to be imposed on Union Carbide is a matter for the legislature and not this Court. However, we do not believe that the legislature contemplated taxing Carbide's right to use and right to enter and leave the Y-12 facility. Clearly, the Legislature could tax these rights by way of a privilege or use tax. *See United States v. Boyd,* 211 Tenn. 139,363 S.W.2d 193 (1962), *aff'd,* 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. 2d 713 (1964). The Legislature could also tax mere possessory interests as California has done. Title 18 Cal. Admn. Code § 2(b) (1971) and Section 107 of the California Revenue and Taxation Code (1970) place a tax on "a possessory interest in nontaxable publicly owned real property. . . ." This scheme was judicially approved in *United States v. County of Fresno,* 50 Cal. App. 3d 633, 123 Cal. Rptr. 548 (1975), *aff'd,* 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977). Tennessee's Ad Valorem Tax is *not* comparable to the California scheme. A similar tax has been proposed but has never been adopted. House Bill No. 73 (S.B. 240) was introduced in 1977 and reintroduced in 1979 as House Bill No. 784 (S.B. 1161) but was not enacted. The bill sought to place a tax on the use of real or personal property that was otherwise exempt from local ad valorem taxation, whether that use was pursuant to lease, contract, license or otherwise. The language of the bill, especially sections 2 and 4, indicated that it was intended to apply to the DOE facilities in Roane and Anderson Counties. We

consider the rejection of this bill as evidence of a legislative intent to not tax Carbide's interest in the Y-12 Plant in Anderson County, Tennessee. Without some clear indication of legislative intent to the contrary, we are unable to say Carbide has a taxable interest in the Y-12 Plant under T.C.A. § 67-5-501 et seq.

Because we are of the opinion that the Plaintiff has no property interest that is subject to taxation under the ad valorem property tax, we need not decide the questions of immunity and valuation raised by the respective parties. The judgment of the Court of Appeals is affirmed. Costs of this appeal are taxed to the Defendants and the cause is remanded to the Chancery Court for further proceedings consistent with this opinion.

COOPER, C.J., and FONES, BROCK and HARBISON, JJ., concur.

APPENDIX D

IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
7TH DIVISION
DAVIDSON COUNTY
PART THREE

No. 82-431-III

Union Carbide Corporation

vs.

Lamar Alexander, et al. and
Board of Equalization of the
State of Tennessee, and
Anderson County, Tennessee

MEMORANDUM

This case concerns the taxability of Union Carbide Corporation's interest in the United States Department of Energy's Y-12 plant at Oak Ridge in Anderson County, Tennessee. Carbide, which operates the plant under contract with the United States government, has appealed a decision of the state Board of Equalization which (1) held that Carbide's interest in the government's real property is taxable to Carbide and (2) set the value of Carbide's interest at $325,000,000.00 for 1980. Review by this Court is pursuant to the Uniform Administrative Procedures Act, T.C.A. § 4-5-322.

The fundamental issue is whether Carbide owns an interest in the real property at Y-12 separate from the ownership interest of the government.

At the outset, it should be noted that two prior suits involving taxation of Union Carbide at Oak Ridge, originating in this Court, have been decided by both the Tennessee Supreme Court and the United States Supreme Court. *Carbide and Carbon*

Chemical Corp. v. *Carson,* 192 Tenn. 150, 239 S.W.2d 27 (1951) aff'd. sub nom; *Carson* v. *Roane-Anderson Co.,* 342 U.S. 232, 72 S. Ct. 257, 96 L. Ed. 257 (1952); *United States* v. *Boyd,* 211 Tenn. 139, 363 S.W.2d 193 (1962); aff'd. 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. 2d 714 (1964). In *Boyd,* a suit involving a Tennessee contractor's use tax, the United States Supreme Court held that Union Carbide is not an agent or instrumentality of the government but rather an independent contractor engaging in a separate, distinct and taxable acitivity at Oak Ridge.

Union Carbide's Separate Taxable Interest

The taxing statutes' definition of real property includes "all rights thereto and interests therein." T.C.A. § 67-601(1). The statutes explicitly direct that "interests of whatsoever character . . . in real property . . . owned separate from the general freehold, . . . be assessed to the owner thereof separately from the other interests in such real estate . . . as real property." T.C.A. § 67-602(6).

The specific language of the statutes is important. A taxable interest in real property is not limited to fee ownership or even to lesser estates such as leaseholds. The definition includes *all* rights and interests; the legislature has directed that all interests *of whatsoever character* be taxed. That is an an apparent expression of intent by the legislature to extend taxation of real property to the maximum extent possible. The definition is broad enough to include a possessory interest when the fee is separately owned by another.

Property ownership is often explained by using the "bundle of rights" theory. The bundle of rights is compared to a bundle of sticks with each representing ownership of one property right. Those rights in the bundle are divisible, and different rights can be separately owned by different entities. The six basic rights of property ownership are:

(1) The right to use.
(2) The right to sell.
(3) The right to lease or rent.
(4) The right to enter or leave.
(5) The right to give away.
(6) The right to refuse to do any of these.

Property Assessment Valuation,
International Association of
Assessing Officers (1977) p. 13.

To determine Carbide's rights in Y-12, the Carbide-Department of Energy relationship must be examined. Y-12 is a nuclear weapons plant consisting of 805 acres of land and approximately 271 buildings, all of which are owned in fee simple by the United States government. It is one of three major Oak Ridge plants and the only one in Anderson County. Carbide has managed, operated, and maintained the plant under contract with the government continuously since 1947. The government's role in the plant's operation is miniscule. Carbide employs 7,109 employees at Y-12; the government employs less than 100.

The Department of Energy pays Carbide all allowable costs incurred by Carbide plus a negotiated fee. The fiscal year 1980 costs for Y-12 were $272,642,000.00. For the year ending September 30, 1980, Carbide received a fee of $7,000,000.00 for the Oak Ridge operation, and it is estimated that $1,800,000.00 of the fee is attributable to Y-12. The contract can be terminated on six months notice by the government and on one year notice by Carbide. At the time of the evidentiary hearings below, there was no indication Carbide would cease its long term possession of Y-12.[1]

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[1]On May 3, 1982, well after all administrative proceedings in this case were concluded, Union Carbide announced its intention to withdraw as the contractor at Oak Ridge. Carbide has offered to extend the current contract three years beyond the September 30, 1983 expiration date.

Care, custody, and possession of the property is vested in Union Carbide which is responsible for safe-guarding and protecting it. Carbide is liable for loss, destruction, or damage to the property if caused by misconduct of its corporate officers or supervising representatives. The company is required to maintain guard and fire fighting forces. Carbide is granted limited rights in technical data and patents developed in performing its contract at Oak Ridge.

Although Carbide uses and possesses the plant for the government, it does so largely to the exclusion of the government. Carbide has an independent profit making purpose and existence at Y-12.[2] Carbide makes the day-to-day management decisions but must use the property as directed by the government either through the contract or through a specific direction.

Here the taxing authorities are dealing with an unusual arrangement. It is difficult to apply traditional concepts of property ownership which evolved from a medieval, feudal society to this post-World War II arrangement between the government and a contractor for the manufacture of nuclear weapons. Persuasive and logical arguments have been made by both sides, experts have expressed differing opinions, and different tribunals have reached different results.[3] The Board of Equalization itself was sharply divided.[4]

The legislature has vested the Board of Equalization with authority to resolve real property tax disputes, and the role of a

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[2] See *United States* v. *Boyd, supra.*

[3] The Assessment Appeals Commission decided in favor of Carbide, holding that Carbide does not have a separate taxable interest in the real property.

[4] The Board of Equalization vote was 4 to 3.

reviewing court is quite limited.[5] Having weighed all the factors, the Board concluded that Carbide does have a taxable interest in Y-12 separate from that of the government's fee ownership. Carbide enjoys two significant rights in Y-12 — the right to use it and the right to enter or leave it. The contract itself expressly gives Carbide possession of the plant. This Court cannot conclude that the Board's decision is in error.

Exemption

Union Carbide asserts that any taxable interest it has in the real property is exempted by state law from taxation because it is "property of the United States . . . used exclusively for public . . . purposes," property specifically exempted by T.C.A. § 67-501. Since Carbide's property interest in Y-12 is separate from the government's, Carbide's property interest is not "property of the United States." Moreover, it is not used "exclusively" for public purposes. In addition to the public purpose of providing for the national defense, the property is used for the private purpose of providing a profit to Union Carbide. *United States* v. *Boyd, supra* 378 U.S. at 46.

The same Tennessee law exemption argument made by Carbide in this case was rejected by the United States Supreme Court in *Jetton* v. *University of the South,* 208 U.S. 489, 28 S. Ct. 375 (1908), in which the Court interpreted Tennessee's tax

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[5] A reviewing court may reverse or modify an agency decision on five grounds. The agency decision must be:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(5) Unsupported by evidence which is both substantial and material in light of the entire record.

T.C.A. § 4-5-322(h).

exemption statute. In upholding Franklin County's taxation of leasehold interests in the university's tax exempt real property, the Court states:

> As long as different interests may exist in the same land, we think it plain that exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years. The two interests are totally distinct, and the exemption of one from taxation plainly does not thereby exempt the other.

302 U.S. at 500.

Neither is Carbide's interest exempt as a matter of federal law. In 1953 Congress amended the Atomic Energy Act to remove the provision which had been interpreted as prohibiting state taxation of Union Carbide's Oak Ridge operation.[6] After that change in the statute, the United States Supreme Court rejected Carbide's federal immunity contention in *United States* v. *Boyd, supra.*

Union Carbide correctly stresses that the tax here-in question is a tax on ownership of an interest in real property and not a privilege tax or a use tax as in *Boyd.* Although the conclusion that Carbide has a separate interest in the real property is not inconsistent with the *Boyd* decision, that decision does not ad-

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[6] Section 9(b) of the Atomic Energy Act stated:

> The [Atomic Energy] Commission, and the property activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof. 42 U.S.C. § 1809(b) (1952 Ed.), repealed by act of August 13, 1953, 67 Stat. 575.

The United States Supreme Court held that the former statute prohibited Tennessee's taxation of Union Carbide's activities at Oak Ridge. *Carson* v. *Roane-Anderson Co., supra.*

dress the issue of a taxable interest in the real property. It does, however, directly address the issue of exemption of Union Carbide's operation at Oak Ridge as a matter of federal law.

Once it is established that Carbide has a taxable interest in the real property apart from that of the government, the holding in *Boyd* becomes fully applicable to the federal exemption issue in this case. The principle is the same; a tax on Union Carbide's separate activity or separate interest is not a tax on the United States government. The Supreme Court has recently even narrowed the circumstances in which government contractors can escape state taxation on federal exemption grounds. *United States* v. *New Mexico*, ____ U.S. ____, 102 S. Ct. 1373, ____ L. Ed. 2d ____ (1982), another suit involving a Department of Energy cost plus fixed fee contract.

Value of Union Carbide's Interest

Two experts testified at the hearing before the Assessment Appeals Commission, one for Anderson County and one for Union Carbide. Because the Commission decided that Carbide did not have a separate taxable interest in the plant, the Commission did not fix the value of that interest. The Board of Equalization valued Carbide's interest at $325,000,000.00, the estimate made by the County's expert.

Anderson County retained J. D. Hollingsworth and Associates of SNashville to conduct an appraisal. The appraisal was not prepared before the County Board's hearing but was presented for the first time to the Assessment Appeals Commission. Mr Hollingsworth considered the three approaches to determine value — market, income, and cost — and concluded that the uniqueness of the property made the cost approach the most reasonable to use. He arrived at a value for the fee simple of $693,560,000.00. He then examined Carbide's interest in the real property and the relationship between Carbide and the government and considered the severe restrictions placed on Carbide's use of Y-12. He then arrived at a value of Carbide's separate interest.

It is the responsibility of the administrative tribunal, not the reviewing court, to resolve issues of fact; the reviewing court is specifically prohibited from substituting its judgment from that of the agency's on questions of fact.[7] Hollingsworth's testimony and his report amply support the Board's decision.

Moreover, there appear to be sound reasons for accepting Hollingsworth's appraisal over Carbide's. Mr. Hollingsworth is an experienced, qualified career appraiser. Carbide's expert is a realtor. Though he is obviously a competent one, skilled in selling industrial property, he does not share Hollingsworth's appraiser credentials. The contract between the Department of Energy and Carbide is crucial to valuing Carbide's interest. Carbide's expert had not even reviewed the contract; Mr. Hollingsworth had considered it in some detail.

Finally, Carbide asserts that its May 1982 announcement, that it is withdrawing from Oak Ridge within several years, should be considered by this Court and that this Court should remand the case for a revaluation in light of the announcement. The instant case involves taxes for 1980; the relevant facts are those which existed then, not now.

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[7] The Administrative Procedures Act states:

> In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
>
> T.C.A. § 4-5-322(h).

CONCLUSION

The decision of the Board of Equalization is affirmed. Counsel for the Board will prepare the decree.

/s/ Robert S. Brandt, Chancellor

February 2, 1983

cc: Jackson C. Kramer
G. Wilson Horde
George John Keto
Mike Lawson
Charles L. Lewis

APPENDIX E

Supreme Court of the United States

No. A-62

ANDERSON COUNTY, TENNESSEE, ET AL.,
Applicants,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 22, 1985.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the United States

Dated this 23rd day of July, 1985.

APPENDIX F

Relevant Sections From Tennessee Code Annotated

4-5-117. Judicial review — Petition — Interim relief — Record — New evidence — Scope of review. — (a) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition for review in a chancery court having jurisdiction within sixty (60) days after the entry of the agency's final order thereon. The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition to rehear. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing which shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the chancellor, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied.

(d) Within forty-five (45) days after service of the petition, or within further time allowed by the court, the agency shall

transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all the parties of the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

(f) The procedure ordinarily followed in chancery courts will be followed in the review of contested cases decided by the agency, except as otherwise provided in this chapter.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.
In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(i) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors which affect the mertis of the decision complained of.

(j) The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record. [Acts 1974 (Adj. S.), ch. 725, § 17; 1975, ch. 370, §§ 6, 19; 1978 (Adj. S.), ch. 815, § 1; 1978 (Adj. S.), ch. 938, § 13; T.C.A., § 4-523.]

4-5-322. Judicial review. — (a) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition for review in a chancery court having jurisdiction within sixty (60) days after the entry of the agency's final order thereon. Provided further, that a person who is aggrieved by a final decision of the department of human services in a contested case may file a petition for review in the chancery court located either in the county of the official residence of the commissioner or in the county in which any one or more of the petitioners reside. The time for filing a petition for review in a court as pro-

vided in this chapter shall not be extended because of the period of time alotted for filing with the agency a petition for reconsideration. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but it it is shown to the satisfaction of the reviewing court, in a hearing which shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the chancellor, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied.

(d) Within forty-five (45) days after service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all the parties of the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

(f) The procedure ordinarily followed in chancery courts will be followed in the review of contested cases decided by the agency, except as otherwise provided in this chapter.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(i) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors which affect the merits of the decision complained of.

(j) The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record.

[Acts 1974 (Adj. S.), ch. 725, § 17; 1975, ch. 370, § 6; 1978 (Adj. S.), ch. 815, § 1; 1978 (Adj. S.), ch. 938, § 13; T.C.A., § 4-523; Acts 1980 (Adj. S.), ch. 478, § 1; T.C.A., § 4-5-117; Acts 1982 (Adj. S.) ch. 874, § 63.]

67-401. Property subject to tax generally. — All property, real and personal, shall be assessed for taxation for state, county and municipal purposes, except such as is declared exempt in §§ 67-501—67-518, or unless otherwise provided. [Acts 1973, ch. 226, § 5.]

67-501. Government property. — All property of the United States, all property of the state of Tennessee, of any county, or of any incorporated town, city, or taxing district in the state that is used exclusively for public, county or municipal purposes shall be exempt from taxation.

Provided, however, that all property of any educational institution owned, operated, or otherwise controlled by the state of Tennessee as trustee or otherwise, shall be exempt from taxation. [Acts 1973, ch. 226, § 5.]

67-601. Definitions. — For purposes of classification of property:

(1) "Real property" is hereby defined to include lands, tenements, hereditaments, structures, improvements; moveable property assessable under § 67-612; or machinery and equipment affixed to realty (except as otherwise provided for herein) and all rights thereto and interests therein, equitable as well as legal.

(2) "Personal property" is hereby defined to include every species and character of property which is not classified as real property.

(3) "Tangible personal property" is hereby defined to include personal property such as goods, chattels, and other ar-

ticles of value which are capable of manual or physical possession, and certain machinery and equipment, separate and apart from any real property, and whose value is intrinsic to the article itself.

(4) "Commercial and industrial tangible personal property" is hereby defined to include personal property such as goods, chattels and other articles of value which are capable of manual or physical possession, and machinery and equipment which is (1) used essentially and principally for the commercial or industrial purposes or processes for which it is intended and (2) if affixed or attached to real property, can be detached without material injury to such real property.

(5) "All other tangible personal property" is hereby defined to include all tangible personal property, including that used in agriculture, except public utility tangible personal property and commercial industrial tangible personal property.

(6) "Intangible personal property" is hereby defined to include personal property such as money, any evidence of debt owed to a taxpayer, any evidence of ownership in a corporation or other business organization having multiple owners, and all other forms of property whose value is expressed in terms of what the property represents rather than its own intrinsic worth. Intangible personal property shall include all personal property not defined as tangible personal property.

(7) "Public utility property" is hereby defined to include all property of every kind, whether owned or leased, and used, or held for use, directly or indirectly in the operation of a public utility, which shall include but not necessarily be limited to the following business entities, whether corporate or otherwise: (1) railroad companies; (2) telephone, radio common carriers and telegraph companies; (3) passenger, sleeping, freight and private car companies which is hereby defined as any business, other than a railroad company, which owns, uses, furnishes, leases, rents or operates to, from, through, in or across this state or any

part thereof any kind of railroad car, including but not necessarily limited to, flat, tank, refrigerator, passenger, or similar type cars; (4) street car companies; (5) power companies, whether hydroelectric, steam, atomic, or other kinds for the transmission of power; (6) express companies; (7) pipeline companies; (8) gas companies; (9) electric light companies; (10) water and/or sewerage companies; (11) motor bus and/or truck companies holding a certificate of convenience and necessity or contract hauler's permit from the Tennessee public service commission or the interstate commerce commission and domiciled in this state and/or owning or leasing real or personal property located in this state; (12) taxicab, transit and limousine companies; (13) commercial air carrier companies holding a certificate of convenience and necessity from the Tennessee public service commission, civil aeronautics board, federal aviation administration, or any other federal or state regulatory agency; excepting those companies whose operations are solely chartered operations; and (14) water transportation carrier companies which operate boats and barges over the waterways of this state for hire and which hold a certificate of convenience and necessity as common carriers from the Tennessee public service commission, interstate commerce commission or any other federal or state regulatory agency.

(8) "Industrial and commercial property" is hereby defined to include all property of every kind used, directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, club (whether public or private), nonexempt lodge, business, or similar purpose, whether conducted for profit or not. All real property which is used, or held for use, for dwelling purposes which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(9) "Residential property" is hereby defined to include all real property which is used, or held for use, for dwelling purposes and which contains not more than one rental unit. All real

property which is used, or held for use, for dwelling purposes but which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(10) "Farm property" is hereby defined to include all real property which is used, or held for use, in agriculture, including, but not limited to, growing crops, pastures, orchards, nurseries, plants, trees, timber, raising livestock or poultry, or the production of raw dairy products, and acreage used for recreational purposes by clubs.

(11) "Moveable structure" is hereby defined to include any mobile home or such other moveable structure which is constructed as a trailer or semitrailer and designed to either be towed along the highways or to be parked off the highways, and which may be used, temporarily or permanently, as a residence, apartment, office, storehouse, warehouse or for any other commercial or industrial purpose; but shall not include self-propelled vehicles, sleeping and camping facilities attached to, or designed to be attached to, or drawn by a pick-up truck or an automobile, and which contains less than three hundred (300) square feet of inclosed space. [Acts 1973, ch. 226, § 6; 1974 (Adj. S.), ch. 467, §§ 2, 3.]

67-602. Place and function of assessment — person to whom assessed. — The function of assessment shall be as follows, to wit:

(1) To assess all property, except such property as shall be assessed by the Tennessee public service commission, to the person or persons owning or claiming to own the same on the first day of January for the year for which the assessment is made, if known and, if not, to unknown owners, provided that any temporary improvement, or moveable structures that are assessable under § 67-612, regardless of ownership, shall be assessed as real property as an improvement to the land where located.

(2) To assess the property held by executors and administrators in the county, district, or ward in which the decedent resided at the time of the death until such have been distributed; but if the deceased lived in another state, then the property shall be assessed where the personal representative resides.

(3) To assess personal property held by trustees and guardians of minors and lunatics to each guardian or trustee in the county, ward, or district where such minor, or lunatic resides, if a resident of the state; and if a nonresident, then in the county, ward or civil district in which the guardian or trustee resides; provided, that guardian held property shall be assessed in the county where the guardian having control thereof renders his annual settlement.

(4) The property of all street railroad, gas, electric light companies and other public utility companies, including their franchises used within any town, city or taxing district where the office of the company is located outside of such incorporated city or town or taxing district, but with the main property within the city, shall be taxed in the city, town, or taxing district as if the office was situated within the city limits, and the property, including franchises of the corporations and joint-stock companies that lie wholly or mainly within any incorporated city, taxing district, or town, or whose chief business is within any incorporated city, taxing district, or town shall be assessed for taxation in such city, taxing district, or town; provided, that all real property and tangible personal property shall be taxed in the district where situated; and provided further that public utility property of every kind (real property, tangible personal property, and intangible personal property) shall all be assessed for taxes at fifty-five per cent (55%) of its value.

(5) Leased personal property used by a public utility company shall be assessed to the public utility company.

(6) All mineral interests and all other interests of whatsoever character, not defined as products of the soil, in real property, including the interest which the lessee may have in and to the improvements erected upon land where the fee, reversion, or remainder therein is exempt to the owner, and which said interest or interests is or are owned separate from the general freehold, shall be assessed to the owner thereof, separately from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real property. [Acts 1973, ch. 226, § 6.]

67-606. Basis of valuation. — The value of all property shall be ascertained from the evidence of its sound, intrinsic and immediate value, for purposes of sale between a willing seller and a willing buyer without consideration of speculative values, and when appropriate subject to the provisions of the Agricultural, Forest, and Open Space Land Act of 1976, codified in §§ 67-650 — 67-658.

In determining the value of all property of every kind, the assessor shall be guided by, and follow the instructions, of the appropriate assessment manuals issued by the state division of property assessments and approved by the state board of equalization.

For determining the value of real property, such manuals shall provide for consideration of the following factors:

(1) location;

(2) current use;

(3) whether income bearing or nonincome bearing;

(4) zoning restrictions on use;

(5) legal restrictions on use;

(6) availability of water, electricity, gas, sewers, street lighting, and other municipal services;

(7) natural productivity of the soil, except that the value of growing crops shall not be added to the value of the land; and

(8) all other factors and evidence of values generally recognized by appraisers as bearing on the sound, intrinsic and immediate economic value at the time of assessment.

For determining the value of industrial, commercial, farm machinery and other personal property, such manuals shall provide for consideration of the following factors:

(1) current use;

(2) depreciated value;

(3) actual value after allowance for obsolescence;

(4) all other factors and evidences of values generally recognized by appraisers as bearing on the sound, intrinsic and immediate economic value at the time of assessment.

(5) Notwithstanding the foregoing, all farm personal property and also all household and kitchen furniture, tableware, musical instruments, wearing apparel, private passenger motor vehicles, jewelry and other personal property of similar character used in the taxpayer's own household, together with all intangible property, including bank accounts, of the taxpayer, may be assumed prima facie by the assessor of property to be of a value not in excess of seven thousand five hundred dollars ($7,500) per individual and fifteen thousand dollars ($15,000) for jointly owned property held by husband and wife in the absence of any tax return or schedule to the contrary.

It is the legislative intent hereby declared that no appraisal hereunder shall be inflated values resulting from speculative purchases in particular areas in anticipation of uncertain future real estate markets; but all property of every kind shall be appraised according to its sound, intrinsic and immediate economic value which shall be ascertained in accordance with

such official assessment manuals as may be promulgated and issued by the state division of property assessments and approved by the state board of equalizan pursuant to law.

Provided, that if the tax computed on an erroneous basis of valuation or assessment has been paid prior to certification of the corrected assessment by the assessor, the trustee or municipal collector shall, within sixty (60) days after receipt of such certification from the assessor, refund to the taxpayer that portion of such tax paid which resulted from the erroneous assessment, such refund to be made without the necessity of payment under protest or such other requirements as usually pertain to refunds of taxes unjustly or illegally collected. [Acts 1973, ch. 226, § 6; 1974 (Adj. S.), ch. 771, § 8; 1976 (Adj. S.), ch. 782, § 13; 1977, ch. 262, § 1.]

67-831. Jurisdiction and duties of state board — Assessment appeals commission powers and duties. — (a) The state board of equalization shall have jurisdiction over the valuation, classification and assessment of all properties in the state. Said board shall have and perform the following duties:

(1) Receive, hear, consider, and act upon complaints and appeals made to the board;

(2) Hear and determine complaints and appeals made to the board concerning exemption of property from taxation;

(3) Take whatever steps it deems are necessary to effect the equalization of assessments, in any taxing jurisdiction within the state in accordance with the laws of the state; and

(4) Carry out such other duties as are required by law.

(b) In addition to the powers and duties conferred upon the state board of equalization by subsection (a) of this section or any other provision of this code, the state board of equalization may by resolution create an assessment appeals commission consisting of not less than three (3) nor more than five (5)

members, and may delegate to such assessment appeals commission the jurisdiction and duties conferred by law upon the state board of equalization to hear and act upon all complaints and appeals regarding the assessment, classification and value of property for purposes of taxation, including, but not limited to, complaints and appeals from assessments made by the Tennessee public service commission, complaints and appeals from actions of local boards of equalization, complaints and appeals concerning exemption of property from taxation, complaints and appeals from assessments made by the division of property assessments, and complaints and appeals concerning the valuation of property for inheritance tax purposes. The assessment appeals commission authorized by this subsection (b) shall be composed and shall function as follows:

(1) The members of the assessment appeals commission shall be appointed by the state board of equalization. Persons who may be appointed to the assessment appeals commission shall be residents of the state and at least eighteen (18) years of age. Members of the state board of equalization, the executive secretary of the state board of equalization, the director of the division of property assessment and local and state officials shall not be precluded from appointment to the said assessment appeals commission by virtue of their positions. At least one (1) of the members shall be a person other than a full time state official.

(2) The state board of equalization shall designate the chairman of the assessment appeals commission.

(3) The members of the assessment appeals commission shall take office for a term of one (1) year and until their successors shall take office.

(4) In the event that there is a vacancy in the membership of the assessment appeals commission, the state board of equalization shall fill the vacancy in the same manner as initial appointments.

(5) The assessment appeals commission shall meet at the call of the executive secretary to the state board of equalizatic n. A majority of the members of the assessment appeals commission shall constitute a quorum.

(6) The asessment appeals commission shall follow such rules and regulations of practice and procedure which may be promulgated by the state board of equalization.

(7) It shall be the duty of the members to discharge the duties of the assessment appeals commission without compensation except that persons who are not officials of the state of Tennessee, who may from time to time serve as members of the assessment appeals commission shall be paid at the rate of fifty dollars ($50.00) per day for each day or part of a day in attendance at meetings of the assessment appeals commission. The members, whether or not they are state officials, shall be reimbursed necessary travel and per diem expenses as prescribed in comprehensive travel regulations by the commissioner of finance and administration for employees of the state of Tennessee, during such service on the assessment appeals commission.

(8) At any time prior to, during or after any proceeding before the assessment appeals commission, authorized by this subsectin (b), it may certify a question to the state board of equalization if such question is determinitive or partially determinative of the proceeding and if such question is found by the assessment appeals commission to be a matter of policy to be determined by the state board of equalization. Proceedings before the assessment appeals commission may be suspended pending the determination of the question certified to the state board of equalization.

(9) Actions taken by the assessment appeals commission shall be final as if the actions were taken by the state board of equalization; provided, however, that the state board of equalization may, in its sole discretion, within forty-five (45)

days of any final action taken by the assessment appeals commission, enter an order requiring a review of the action of the assessment appeals commission by the state board of equalization, in which the action shall not become final until the state board of equalization has rendered its final decision in the matter. A party desiring the state board of equalization to review an action of the assessment appeals commission must file a written petition with the executive secretary to the state board of equalization within fifteen (15) days of that action of the assessment appeals commission. The above shall not be construed to limit in any way the authority of the state board of equalization to order a review upon its own motion within forty-five (45) days of an action of the assessment appeals commission. In the event that the state board of equalization does exercise its discretion to review any action of the assessment appeals commission, said review may be upon the record before the assessment appeals commission or in such manner as the state board shall direct.

(10) If the state board of equalization shall not exercise its discretion to review a matter heard by the assessment appeals commission, the assessment appeals commission shall issue a certificate of assessment or other final certificate of its actions, which certificate shall be subject to judicial review in the same manner as are final actions of the state board of equalization.

(11) The assessment appeals commission shall prepare and maintain records of its proceedings in the form of minutes. The said minutes, together with all other papers and records of the assessment appeals commission, shall be kept and maintained in the office of the executive secretary to the state board of equalization. [Acts 1973, ch. 226, § 10; 1975, ch. 171 § 1; 1979, ch. 64, §§ 1, 2; 1980 (Adj. S.), ch. 467, § 1.]

67-1805. Fee exempt from tax on leasehold.— Where there is assessable under the law a leasehold interest in real estate or any improvements on real estate, which said real estate is exempt from taxation in the hands of and to the owner thereof, the

taxes assessed against such leasehold interest or interest in improvements on such exempt real estate shall be a lien only upon such leasehold interest or interest in improvements, and not upon the interest of the owner of the fee or the remainder or reversion of the fee. [Acts 1907, ch. 602, § 31; Shan., § 758a3; Code 1932, § 1333.]

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

APPENDIX H

Paragraph 9 of AFFIDAVIT dated August 16, 1983 by MR. JOE LA GORNE, Oak Ridge Operations Office, U.S. Department of Energy, in support of United States Motion for Summary Judgment filed on August 18, 1983 in the United States District Court for Eastern Tennessee.

9. Acting as procurement agent for the Government, Carbide procures materials and supplies for carrying out DOE's program at Y-12 and the other facilities. The Government owns all real and personal property of every kind and description used in the operation of the Y-12 Plant, including materials and components used in all plant operations. Neither Contract No. W-7405-ENG-26 nor any other agreement, oral or written, nor any deed, lease, conveyance, license, nor any other document confers or purports to confer upon Carbide any estate, leasehold, license, permit, or any other right, title or interest in or to the Y-12 Plant or any portion thereof. Nor does it purport to grant Carbide the exclusive use and occupancy of the Y-12 Plant. By virtue of such contract, Carbide has only the right of access to the Y-12 Plant to perform its duties under the contract. At all times, title to the land on which the Y-12 Plant is located, title to all the buildings that comprise the Y-12 Plant, and title to all the equipment and supplies used at the Y-12 Plant has been and remains in the United States Government.

APPENDIX I

AFFIDAVIT dated August 16, 1983 by MR. ROGER F. HIBBS, President, Union Carbide Corporation, Nuclear Division, filed in support of United States Motion for Summary Judgment filed on August 18, 1983 in the United States District Court for Eastern Tennessee.

IN THE
DISTRICT COURT OF THE
UNITED STATES OF AMERICA
FOR THE EASTERN DISTRICT OF TENNESSEE
Northern Division

Civil Action No. 3-82-83

United States of America,

v.

Anderson County, Tennessee; David O. Bolling, Anderson County Executive; **Patsy Stair,** Anderson County Trustee; **Owen Richardson,** Anderson County Property Assessor; **Clyde Clairborne, Robert Jolley, Jerry George, Everett Sharp, Charlotte Hayes, Helen Norman, Ernie Phillips, Q. V. Leinart, Kenneth Wallace, Darell Copeland, Jim Hackworth, Jack Keeney,** and **Jack Rains,** County Commissioners of Anderson County; **Charles Oldham, K. E. Jones, R. R. Tippy, Harry Young,** and **Tom F. Mullinix,** The Anderson County Board of Equalization; **The Board of Equalization of the State of Tennessee,** and its members, **Lamar Alexander, Gentry Crowell, William C. Koch, Jr., William Snodgrass, Harlan Matthews, Claude Ramsey, Martha Olsen,** and **John E. Sloan, Jr.,**
Defendants

Declaration of Roger F. Hibbs

Roger F. Hibbs declares and says:

1. I am the President of the Nuclear Division of Union Carbide Corporation, the highest administrative position of the Corporation at Oak Ridge, and have held that position since 1969.

2. In my capacity as President of the Nuclear Division, I personally participated in the negotiation of Modification No. A057 to Contract No. W-7405-ENG-26 with the United States Department of Energy.

3. Union Carbide Corporation has never claimed or asserted an ownership interest in the real property it contracted to manage, operate and maintain for the Department of Energy and it has never made a claim, in Contract No. W-7405-ENG-26 or otherwise, adverse to the Government's complete and absolute ownership of such real property.

4. Union Carbide Corporation does not operate, manage and maintain the Y-12 Plant or any of the other Government facilities under the contract to the exclusion, in any degree, of the Government nor does it construe Contract No. W-7405-ENG-26 as giving Union Carbide Corporation the right to do so.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 1983.

/s/ Roger F. Hibbs, President
Union Carbide Corporation
Nuclear Division
Post Office Box Y
Oak Ridge, Tennessee 37830
Telephone: (615) 574-3619
(FTS) 624-3619

APPENDIX J

STATE BOARD OF EQUALIZATION
Sacramento, California 95314

[July 17, 1980]

IN THE MATTER OF
THE APPEAL OF
CALIFORNIA FRANCHISE TAX
For the Income Years Ending
December 31, 1971
December 31, 1972
and
December 31, 1973

by

UNION CARBIDE CORPORATION
Corporation Number 1910770

Gentlemen:

Taxpayer, UNION CARBIDE CORPORATION, a New York Corporation, with its principal office at 270 Park Avenue, New York, New York 10017 does hereby appeal Notices of Action by the Franchise Tax Board dated June 19, 1980, for income years ending December 31, 1971, December 31, 1972 and December 31, 1973.

The original Notices of Proposed Assessment dated April 19, 1979, indicate additional California Franchise tax due in the following amounts:

Year	*Number*	*Amount*
1971	00265402	$105,470.95
1972	00265402	145,913.96
1973	00265403	256,432.31
Total		$507,867.22

In computing the property factor of the apportionment fraction, the assessment gives no recognition to the value of government-owned property "used" by the Taxpayer in the

operation of government-owned plants as part of its unitary business. The Taxpayer operates four United States Government-owned nuclear energy facilities for the Department of Energy. We operate two gaseous diffusion plants producing enriched uranium concentrate. This enriched uranium meets a vital role in supplying nuclear fuel for nuclear power generating facilities. Another plant, the Oak Ridge Y-12 plant, is a highly sophisticated manufacturing and developmental engineering unit. The Oak Ridge National Laboratory is a large multipurpose laboratory with activities in the areas of energy, environmental and biomedical research and development. During this period, 15,000 Union Carbide employees provided the manpower resources in furnishing the highly sophisticated skills in carrying out the terms of the cost-plus-fixed-fee contract.

The contract is a long-term agreement giving Union Carbide Corporation full control over the property which is a necessary and integral part of our business operations. Under a cost-plus operation, we do not pay an agreed rental for the government facilities, but we do have exclusive use and possession of the property.

A search of the application of the Uniform Division of Income for Tax Purposes Act, as adopted by the State of California (Sections 25120 through 25139 of the Revenue and Taxation Code) has revealed:

1. The interpretation of "used" property includes property available or capable of being used in the business. (Franchise Tax Board Regulation (§ 25129(b).)

2. If government-owned property is used rent free, a reasonable rental rate will be established so as to effectuate an equitable apportionment of the taxpayer's income. (Franchise Tax Board comments dated January, 1967 P. 9; also the 1971 Uniform Apportionment Conference of the California Certified Public Accounts Foundation for Education and Research).

3. If property is used at no charge or rented for a nominal rate, the property shall be included in the property factor on the basis of a reasonable market rental rate. (Franchise Tax Board Regulations (§ 25130)(B); § 25137(b)(1)(B).)

The Multistate Tax Commission in their audit of Union Carbide Corporation for certain member states included a reasonable rental rate in the property factor for the use of the government-owned facilities operated by the Corporation. Other member states independently conducting an audit of Union Carbide Corporation have also included the use of the government-owned facilities in the property factor. This is based on the same Uniform Act adopted by the Multistate Tax Compact and its member states including the State of California.

Since the Taxpayer, UNION CARBIDE CORPORATION, is operating the government facilities under a cost-plus operation the Corporation in effect is a tenant of the property and while not paying an agreed rental, it has the exclusive use and possession of the property. As the operator and general contractor we do not have the conventional business alternative of owning or not owning the facilities used. In apportioning the income from a contract of this type, consideration must be given to the occupancy and use of the government property. For the State of California not to recognize the use of the government property in the property factor of the apportionment fraction is inequitable and unfairly penalizes this Corporation in matters over which it has no control.

Like many other companies, Union Carbide Corporation has used nuclear energy in its own business, both in production operations and in research. Radioisotopes are used as tracers in checking reactions in making chemicals and plastics. Our agricultural researchers have used radioisotopes to study fertilizers used in plant nutrition and in studying fungicides and herbicides. Union Carbide's nuclear facility at Sterling Forest, New York operates a

five-megawatt nuclear reactor to produce radioisotopes, radiodiagnostic reagents and kits. These products are used in nuclear medicine and are part of our current Nucleonics business. At another facility, we assemble the instruments for our "CentrifiChem" and "Centria" automated systems to analyze blood. Both of these blood analysis systems and reagents are marketed by Union Carbide. The original research to develop the blood analyzers and reagents was performed at Oak Ridge.

In addition to operating the government-owned nuclear energy facilities, we own and operate uranium mines and uranium processing mills. Some of the uranium ores mined and uranium concentrates produced are sold to the government for nuclear energy production.

The Taxpayer also takes exception to the inclusion in California sales of the sales factor of the apportionment fraction shipments to foreign countries originating in California in the following amounts:

1971	$1,654,317
1972	$1,499,831
1973	$1,456,184

In apportioning income from world-wide operations Union Carbide through its subsidiary companies has a presence in the foreign jurisdictions to which sales originating in California are shipped. Also tax-treaty provisions exempt the Corporation from filing tax returns. Therefore, such sales should not be included as part of California sales.

Therefore, the Taxpayer, UNION CORPORATION, respectfully requests the assessment be corrected. If the State Board of Equalization denies this request, we request a hearing be granted.

Respectfully submitted,

UNION CARBIDE CORPORATION

By: /s/ L. R. Dowden
Manager
State Income Taxes

cc: Franchise Tax Board

LRD/gt

July 11, 1980

UNION CARBIDE CORPORATION
270 Park Avenue, New York, N.Y. 10017

[Received: May 29, 1981]

May 22, 1981

Mr. John R. Akin
Counsel
Franchise Tax Board
Sacramento, California 95867

Subject: 410:JRA:jt
Union Carbide Corporation

Dear Mr. Akin:

The following is in reply to your request for further clarification and additional information regarding our operation of government-owned nuclear energy facilities.

For information and background, originally, Union Carbide became involved in the Manhattan Project as part of the effort to develop the nation's atom program in World War II. The development of a process to separate and enrich uranium isotopes in large quantities required the expertise of an industrial manufacturing company. Union Carbide's special resources, skills and extensive knowledge in the highly technical fields of chemistry, physics and metallurgy and its long experience with gas-separation and processes using extreme temperatures and pressures contributed to this important project. With the building of the first separation plant, Union Carbide was assigned not only to operate the plant, but to assist in the design and construction. The first contract required the Corporation to provide engineering and research help in addition to operating the plant.

The scope of the original contract signed in January 1943, has been expanded many times. The policy of the management, operation and use of the government-owned nuclear energy facilities was adopted by the United States

Congress under the Atomic Energy Act of 1946. The national policy in the area of nuclear energy as adopted by Congressional action was to gain the full advantage of the skill and experience of American industry and at the same time ensure the protection of public interest. This was accomplished by the use of a private contractor to produce fissionable material and operate and maintain plants owned by the government.

Under the terms of the contract, we manage and operate the facilities, furnish all purchasing, personnel, accounting, legal, technical and other services to perform the work and services required, collect all revenues and acquire, sell or dispose of property for the government. The work and services required include the production of fissionable materials which includes all methods of manufacturing, producing, refining or processing and the separation of fissionable material from other substances.

The contract recognizes the capability of Union Carbide as an organization having the ingenuity and qualifications both technical and administrative to provide the services required. We are responsible to provide plant managers, supervisors, professional, technical, skilled and nonskilled personnel to carry out the work to be performed. Several sections of the contract specify and support the fact we have independent control and discretion in operating and maintaining the government-owned facilities. For example:

a) Article II of the contract provides for the engagement of the Corporation to manage, operate and maintain the government-owned facilities and to perform the work and services previously described and collect revenues, acquire, sell or dispose of property. It further states the Corporation will use its *best judgement, skill* and *care.*

b) Article III of the contract describes the work and services to be performed including the manufacture, production and processing of uranium and

fissionable materials. It also stipulates that R&D work will be provided with the objective to maintain United States leadership in technology and production of uranium. We also have exclusive use of the facilities, materials and equipment in our custody.

Under this cost plus operation, this means we have full control over the property and operate and maintain the facilities at our discretion. The direction and supervision of operations at each facility is controlled and exercised by Union Carbide. The nature and extent of government control is exercised by inspection and audit of books of account and records kept by us. Under the terms of the contract, we are required to furnish progress reports and schedules, financial and cost reports relating to the operations and activities of each facility. The United States Atomic Energy Commission, (now United States Department of Energy) has the right to inspect the work and activities of Union Carbide at these installations. Our Nuclear Division management located at Oak Ridge, has complete control of day to day operations and makes all decisions to carry out the terms of the contract. By our experience and know-how we are able to do all things necessary to carry out the work to be performed. In this regard, we risk part of our reputation, however, if things go well, our prestige is increased.

Regarding Items 2, 3 and 4 of your letter, we submit the following to clarify the nature and activities of facilities operated:

Gaseous Diffusion Plants

All of the manufacturing activities at the gaseous diffusion plants relates to the production of enriched uranium. As part of ongoing technology relating to the production of enriched uranium and improvements in the gaseous diffusion process, certain development studies are undertaken from time to time. It was not intended to imply

that other activities occurred at these facilities by use of the words "primary mission". This connotation has been used in our publications to denote the chief product of enriched uranium, i.e. "high importance" and was not intended to infer other activities occurred.

Y-12 Plant

At this plant none of its activities are devoted to R&D work. The manufacturing operations conducted cover components for nuclear weapons and processing of nuclear materials. Other activities, most of which are of a "classified" nature, include devices for space exploration and techniques for the disposal of production effluents such as nitrates, oil and machine coolant wastes. The Y-12 plant has mnaufactured several items used by astronauts in space exploration. (For your information, our facility at Tonawanda, New York has developed an insulation system used by NASA to keep rocket fuel at extremely cold temperatures needed for manned space flights.)

Oak Ridge National Laboratory

The activities covering all fields of science and technology are conducted for the government. Major efforts are concentrated in four broad, closely interrelated areas: nuclear (fission) energy development and safety; physical science research; environmental and biomedical research; and fission energy development.

In apportioning the income from a contract of this type, consideration must be given to the occupancy and use of the government-owned property. It is our contention this property should be included in the denominator of our property factor. This problem has been considered in the McDonnell Douglas Case, wherein it was recognized that for California franchise tax purposes the use of government-owned property utilized by McDonnell Douglas was property includible in the property apportionment factor.

With respect to this question, we believe the facts in our operation and use of government-owned facilities are similar to McDonnell Douglas in the following respects:

a) Both contractors performed the work required in government-owned facilities under a cost-plus-fixed-fee contract.

b) The nature of government direction in McDonnell Douglas determined which models of airplanes were to be manufactured and the place of manufacture. In our operation the government direction requires us to produce fissionable material in the only facilities allowed to produce this product. Such facilities by Act of Congress must be government-owned.

c) During the years involved, the McDonnell Douglas contract required the use and operation of a government facility to manufacture exclusively for the government.

d) Both contractors did not have the conventional business alternative of owning or not owning the facilities used.

e) Under the terms of both contracts the use of government-owned facilities was essential to the performance and consequent production of income.

Based on this, our operation of the nuclear energy facilities are a necessary and integral part of our business operations. Under this cost plus contract, we have been given full control over the property, *only* our employees are involved in the use and operation of the facilities. In providing the services required, we use the facilities in our custody and under our control. In essence we treat the facilities, materials and equipment as though they were our own. To imply that we are only custodians of the government property and the property is used at the discretion of the government overlooks the abilities and "know-how" of Union Carbide. It is Union Carbide that is engaged in the manufacture and production of fissionable

materials at these facilities. Our employees, totalling 15,000 people run the plants. The manufacture, production, refining, development and processing of fissionable material is done by our people at our discretion. The contractual mechanism used for over 38 years has provided greater ability and know-how than would have been permitted under direct government operation.

I believe this information together with information previously furnished to the Franchise Tax Board should help you properly evaluate the issue at hand.

If you have any questions before reaching a decision, please contact me. Again, we are willing to visit your office to discuss the facts to reach an equitable solution in this matter.

Very truly yours,

/s/ L. R. Dowden
Manager
State Income Taxes

LRD/gt

cc: State Board of Equalization

APPENDIX K

CALIFORNIA STATE BOARD OF EQUALIZATION
April 5, 1984

APPEAL OF UNION CARBIDE CORPORATION
[Para. 400–813]

OPINION

This appeal is made pursuant to section 25666 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protect of Union Carbide Corporation against proposed assessments of additional franchise tax in the amounts of $105,470.95, $145,913.96, and $256,482.31 for the income years 1971, 1972, and 1973, respectively

Two questions are presented in this appeal: (1) whether respondent, in computing appellant's apportionment formula sales factor, properly applied the "throw back" rule to certain sales of goods shipped from California to customers in foreign countries, thereby attributing those sales to California; and (2) whether respondent properly excluded from the property factor government-owned property which was used by appellant in its unitary business.

Appellant is a New York corporation with its principal office in New York City. It is a large diversified company whose activities include research and development and the production of chemicals, plastics, gases, gas-related products, metals, carbons, consumer products, and nuclear products. During the appeal years, appellant had subsidiaries operating in a number of foreign countries. Appellant was engaged in a single unitary business with one or more of its subsidiaries and filed its California franchise tax returns using combined report and apportionment formula procedures.

Appellant, since it was engaged in a single unitary business, was subject to the apportionment and allocation provisions of the Uniform Division of Income for Tax

Purposes Act (UDITPA), found in sections 25120 through 25139 of the Revenue and Taxation Code, in determining its income attributable to and taxable by California. (Rev. & Tax. Code, § 25101; Cal. Admin. Code, tit. 18, reg. 25101, subd. (f).) Under UDITPA, a taxpayer's income attributable to this state is determined by multiplying its business income by a fraction (commonly called the apportionment formula), the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three. (Rev. & Tax. Code, § 25128.) The property, payroll, and sales factors are fractions, the denominators of which are composed of the taxpayer's worldwide property values, payroll, and sales, respectively, and the numerators of which are composed of the taxpayer's California property values, payroll, and sales, respectively. (Rev. & Tax. Code, §§ 25129, 25132, 25134.) It is the value of the numerator of appellant's sales factor and the value of the denominator of appellant's property factor which are at issue in this appeal. For ease of discussion, each of these factors will be discussed separately.

Sales Factor

* * *

Property Factor

Appellant was involved with the Manhattan Project during World War II and assisted in the development of a process to separate and enrich uranium isotopes. It also assisted in the design and construction of the first nuclear gas-separation plant and, upon its completion in 1943, began operating the plant under a contract with the federal government. The scope of the original contract has been expanded over the years, and during the appeal years, appellant managed and operated four nuclear facilities in Kentucky and Tennessee.

Under its contract with the government, appellant was

responsible for the full management, operation, and maintenance of the facilities and provided all necessary services, such as purchasing, personnel, and accounting. Appellant's technical responsibilities were the production and separation of fissionable materials, the production of nuclear devices, and research and development. All products were produced for the federal government. The Atomic Energy Commission provided general direction over programs, and, in the absence of applicable directions and instructions, appellant was to use its best judgment, skill, and care in performing the contract.

Appellant provided the described services for the government under a "cost plus fixed fee" contract. For the years in question, the reimbursed costs and fixed fees were:

	1971	*1972*	*1973*
Costs	$341,900,000	$363,381,000	$397,584,000
Fee	3,700,000	3,700,000	3,700,000
Total	$345,600,000	$367,081,000	$401,284,000

Appellant did not, and could not, own these nuclear facilities which it used, and no rent was paid for its use of the facilities. It did, however, have exclusive use of the facilities, materials, and equipment.

In appellant's computation of its property factor for the income years 1971, 1972, and 1973, it included in the denominator a value for the government-owned nuclear facilities. Respondent determined that no value should have been included for this property and adjusted the property factor accordingly. Before discussing the arguments of the parties, a review of the statutes and regulations involved is necessary.

Revenue and Taxation Code section 25129 provides:

> The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property

> owned or rented and used in this state during the income year and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the income year.

Section 25130 of the Revenue and Taxation Code describes how property is to be valued for purposes of section 25129.

Revenue and Taxation Code section 25137 provides:

> If the allocation and apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Franchise Tax Board may require, in respect to all or any part of the taxpayer's business activity, if reasonable.
>
> (a) Separate accounting;
>
> (b) The exclusion of any one or more of the factors;
>
> (c) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state, or
>
> (d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Pursuant to this section, respondent has required certain taxpayers to use non-standard formulas or factors and has promulgated regulations setting forth the procedures to be used by those taxpayers (Cal. Admin. Code, tit. 18, reg. 25137 (art. 2.5).)

After UDITPA was adopted in 1966, the Franchise Tax Board issued an explanation of the new act titled *Comments Regarding Application of the Uniform Division of Income for Tax Purposes Act* (hereinafter "Comments"). (Cal. Tax Rep. (CCH) ¶ 203-548 (1967)

(1966–1971 Transfer Binder).) Regarding section 25130, the Comments provided, in part:

> If government owned property is used rent free, . . . a reasonable rental rate will be established so as to effectuate an equitable apportionment of the taxpayer's income.

Later, a regulation was adopted under section 25130, which stated in part:

> If property is used at no charge or rented for a nominal rate, the property shall be included in the property factor on the basis of a reasonable market rental rate.

(Cal. Admin. Code, tit. 18, reg. 25130, subd. (b)(1) (art. 2).)

New regulations under UDITPA were subsequently adopted, applicable for income years beginning after December 31, 1972. In this set of regulations, regulation 25137 sets forth special rules for the property factor, one of which states:

> If property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate, the net annual rental rate for such property shall be determined on the basis of a reasonable market rental rate for such property.

(Cal. Admin. Code, tit. 18, reg. 25137, subd. (b)(1)(B) (art. 2.5).)

Respondent contends that, under section 25129, supra, only property that is owned or rented by the taxpayer may be included in the property factor. Because there is no provision in the standard formula for inclusion of property which is not owned or rented by the taxpayer, respondent argues that appellant must show that it is entitled, under section 25137, supra, to use a special apportionment method. It points out that this board has held that the

party seeking relief under section 25137 bears the burden of proving that exceptional circumstances exist which justify application of that section. (E.g., *Appeal of The O.K. Earl Corporation,* Cal. St. Bd. of Equal., April 6, 1977; *Appeal of Donald M. Drake Co.,* Cal. St. Bd. of Equal., Feb. 3, 1977; *Appeal of New York Football Giants, Inc.,* Cal. St. Bd. of Equal, Feb. 3, 1977.) Appellant, it contends, has not shown such exceptional circumstances and thus must use the standard formula which would not include any value in the property factor for the government-owned nuclear facilities.

Appellant, however, states that it is not seeking relief from the standard UDIPTA formula, but is requesting that respondent apply its own regulation 25137, subdivision (b)(1)(B), supra, in computing the property factor of the apportionment formula. For the reasons set forth below, we hold that respondent must apply its own regulation and include in the property factor a value for the government-owned nuclear facilities.

The federal courts have had a number of occasions to consider whether regulations of the Treasury Department are binding on that agency. The concensus of these courts has been that Treasury regulations, unless they are invalid, are as binding on the government as they are on the taxpayer. (E.g., *Zuchman v. United States,* 524 F.2d 729, 739 (Ct. Cl. 1975); *Petroleum Heat and Power Co. v. United States,* 405 F.2d 1300, 1306 (Ct. Cl. 1969); *Hugoton Production Company v. United States,* 315 F.2d 868, 871 (Ct. Cl. 1963); *McCord v. Granger,* 201 F.2d 103, 106 (3d Cir. 1952); *Pacific Nat. Bank v. Commissioner,* 91 F.2d 103, 105 (9th Cir. 1937).)

For nearly 20 years, respondent has consistently taken the position that a value for property used but not owned or rented should be included in the property factor "so as to effectuate an equitable apportionment of the taxpayer's income." (*Comments,* supra.) This position has been part of appellant's formal regulations since the first regulations

under UDIPTA were promulgated and is now found in regulation 25137, subdivision (b)(1)(B).

Respondent, however, appears to contend, that, regardless of the fact that this regulation is specifically addressed to the precise issue raised here, it is not bound to follow that regulation because it has been promulgated pursuant to section 25137. Respondent is correct in asserting that special treatment under that section is allowed only when exceptional circumstances are present, i.e., the normal allocation and apportionment methods of UDITPA do not fairly represent the extent of the taxpayer's business activity in this state, and that the burden of showing such exceptional circumstances rests on the party seeking relief under section 25137.

However, respondent has determined that in a number of situations, the standard UDITPA methods do not appropriately reflect the extent of taxpayers' business activity in this state and has issued regulations under section 25137 setting forth the methods which it requires taxpayers to use in those situations. (Cal. Admin. Code, tit. 18, reg. 25137, subd. (b).) Respondent's determinations of these special situations, it must be assumed, were based on careful consideration and a conscious decision that, in these situations, the taxpayer's business activities were not fairly reflected by use of the standard formula. (See *Appeal of the O.K. Earl Corporation,* supra.)

Regulation 25137, subdivision (b), provides special rules which respondent has established with respect to the property factor. Subdivision (b)(1)(B) of that regulation deals precisely with the issue of property owned by others and used by the taxpayer at no charge. By issuing that regulation, which reaffirms the position respondent has publicly taken for almost 20 years, respondent has effectively conceded that where property owned by others is used by the taxpayer at no charge, a value for that property must be included in the property factor in order to fairly reflect the extent of the taxpayer's business

activity in this state. The Franchise Tax Board's disregard of this regulation flys in the face of the principle that an agency's regulations bind the taxpayer and the agency equally. A taxpayer has the right to rely on the regulations of the taxing agency, and that agency should not be allowed to ignore its own regulation simply because to apply it in a particular case would be disadvantageous. (*Mutual Savings Life Insurance Co. v. United States,* 488 F.2d 1142, 1145–1146 (5th Cir. 1974).)

Although we have consistently held that the party requesting use of a special formula bears the burden of showing that exceptional circumstances exist, that requirement seems an empty exercise when the parties agree that exceptional circumstances exist. Appellant has stated that exceptional circumstances exist because it was impossible for it to own or rent the facilities and because of the nature of its use of the facilities, which entailed essentially all the attributes of ownership or rental except for title or lease. Respondent, by its specific regulation on the subject pursuant to section 25137, must be considered to have implicitly agreed that this circumstance is exceptional and requires a special formula.

UDITPA's stated purpose was "to make uniform the law of those states which enact it." (Rev. & Tax. Code, § 25138.) We have required that the party seeking relief under section 25137 bear the burden of proving that exceptional circumstances exist in order to ensure that UDITPA would be applied as uniformly as possible. (*Appeal of New York Football Giants, Inc.,* supra.) We do not believe that our holding in this case does violence to that principle. Respondent's regulation is one of the uniform regulations promulgated by the Multistate Tax Commission for use under UDITPA by the states which adopt it. (MTC Reg. IV.18.(b)(2).) We must assume that other UDITPA states have also adopted this regulation. Appellant points out that in an audit conducted by the Multistate Tax Commission for several of its member

states covering the same years as those now on appeal, a reasonable rental rate for the government-owned facilities was included in the property factor and that similar treatment was accorded in independent audits by other member states. Although respondent has stated that these audits are "of no consequence as California was *not* a party to the audit" (emphasis in original) (Resp. Br. at 18-19), we find them to be of significance as showing that uniformity will be promoted by requiring the Franchise Tax Board to apply its regulation as other UDITPA states have done.

The Franchise Tax Board has not argued that regulation 25137(b)(1)(B) is invalid, that the property was not used in appellant's unitary business, or that the value assigned to the property by appellant was incorrect or unreasonable. Respondent, therefore, must include the value of the government-owned facilities in the denominator of the property factor.

APPENDIX L

EXCERPT
FROM UNION CARBIDE BRIEF OF AUGUST 30, 1984 TO THE TENNESSEE SUPREME COURT

For the Court's information, Counsel has recently been advised of the decision of *Appeal of Union Carbide Corporation,* Calif. Tax Reports (CCH) ¶ 440-813 (April 5, 1984) (App. p. 260) in which the California State Board of Equalization held that a value for the Y-12 plant at issue in this case should be included in the property factor in computing Union Carbide's California franchise tax liability for the years 1971 through 1973. That decision was based upon a California Franchise Tax Board regulation which requires that "[i]f property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate . . ." a value for the property must be included in the property factor. Cal. Admin. Code, tit. 18, reg. 25137, subd. (b)(1)(B) (effective after 1972).

The Franchise Tax Board had contended that it was not bound by its published regulation. The State Board of Equalization held that the Franchise Tax Board was bound by its regulation and that the regulation established that there were "exceptional circumstances" which warranted including the Y-12 plant and other government owned facilities in the property factor although they were neither owned nor leased by Union Carbide. (It should be noted that if the State Board had found that the property was owned by Union Carbide or leased the value of the Y-12 plant would have been included in the property factor under Cal. Admin. Code, tit.18, reg. 25130, subd. (a) or (b), respectively, instead of under regulation 25137.)

California imposes a franchise tax upon the California income of businesses conducting operations in California under the worldwide unitary method. Under California's unitary method the worldwide income of a taxpayer is apportioned (allocated) between California and non-California jurisdictions based upon a three-factor formula. The three factors are property, payroll and sales.

The only issue before the California State Board that concerned the Y-12 plant involved the property factor.

The California State Board did not purport to, nor did it, determine that Union Carbide held a real property interest in the facilities. It did not need to reach that issue under the California franchise tax regulation in controversy although it did describe Union Carbide's interest as the right of "exclusive use" of the facilities and stated that Union Carbide's use "entailed essentially all the attributes of ownership or rental except for title or a lease."[6] We submit that those statements are *dicta* not necessary to the California State Board of Equalization holding.

Union Carbide admitted in California, as it does here, that it did not and could not have an ownership interest in Y-12 facilities either *de jure* or *de facto*. The California Board stated in its opinion that:

> Appellant [Union Carbide] did not, and could not, own these nuclear facilities which is used,

and no rent was paid for its use of the facilities.

Union Carbide did contend that its rights under contract W-7405-ENG-26, until and unless it was terminated, gave it "exclusive" use of the facilities subject to the government's rights under the contract and its contractual duties to the government (see footnote 6). The California State

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[6]Union Carbide did not contend that its use "entailed essentially all the attributes of ownership or rental except for title or a lease". It did contend that it had the "exclusive use of the facilities, materials, and equipment". In the context of these proceedings it was clear that Union Carbide's "exclusive" use of the facilities under contract W-7405-ENG-26 was not to the exclusion of the government but referred to the right to use those facilities for their intended operational purposes under the terms of that contract, a right that was not enjoyed by any other private party independent of Union Carbide as long as those contract terms remain in effect. See Affidavit of L. R. Dowden, App. p.266. (Affidavit supplied for purpose of explaining the California decision not for evidentiary purposes.)

Board of Equalization found that Union Carbide had the exclusive right to use the facilities in question. Of course, that right was subject to the direction and instructions of the Atomic Energy Commission (now Department of Energy) as described in the contract. The California Board stated that:

> The Atomic Energy Commission provided general direction over programs, and, in the absence of applicable directions and instructions, appellant [Union Carbide] was to use its best judgment, skill, and care in performing the contract.

The contract also provides that government personnel have access to the facilities and the California State Board was aware of an ownership interest owned separately from the fee. Again, as noted by the Court of Appeals, "the mere use by Carbide of the real property for purposes of performing the contract does not amount to an incident of ownership. Carbide's rights under the contract are not separate from the fee ownership of the United States." (App. p. 258.) Based upon long established rules of law in the State of Tennessee and upon the facts contained in the records, Union Carbide does not have a taxable interest in real property subject to ad valorem taxation under the Tennessee real property tax statutes.

APPENDIX M

Excerpts From Contract No. W-7405-ENG-26

ARTICLE XXIV - **STATE AND LOCAL TAXES**

(a) The Corporation agrees to notify DOE of any State or local tax, fee, or charge levied or purported to be levied on or collected from the Corporation with respect to the contract work, any transaction thereunder, or property in the custody or control of the Corporation and constituting an allowable item of cost if due and payable, but which the Corporation has reason to believe, or DOE has advised the Corporation, is or may be inapplicable or invalid; and the Corporation further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by DOE. Any State or local tax, fee, or charge paid with the approval of DOE or on the basis of advice from DOE that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

(b) The Corporation agrees to take such action as may be required or approved by DOE to cause any State or local tax, fee, or charge referred to above to be paid under protest and to take such actions as may be required or approved by DOE to seek recovery of any payment made, including assignment to the Government or its designee of all rights to an abatement or refund thereof, and granting permission for the Government to join with the Corporation in any proceeding for the recovery thereof or to sue for recovery in the name of the Corporation. If DOE directs the Corporation to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the Corporation for a tax, fee, or charge it has refrained from paying in accordance with this article, the procedures and requirements of the article entitled "Litigation and Claims" shall apply and the costs and expenses incurred by the Corporation shall be allowable items of cost, as provided in this contract,

together with the amount of any judgment rendered against the Corporation.

(c) The Government shall save the Corporation harmless from penalties and interest incurred through compliance with this article. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of the Government.

ARTICLE XVIII - **LITIGATION AND CLAIMS**

(a) **Initiation of Litigation.** The Corporation may, with the prior written authorization of the Contracting Officer, and shall, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The Corporation shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.

(b) **Defense and Settlement of Claims.** The Corporation shall give the Contracting Officer immediate notice in writing (1) of any action, including any proceeding before an administrative agency, filed against the Corporation arising out of the performance of this contract, and (2) of any claim against the Corporation the cost and expense of which is allowable under any provision of this contract. Except as otherwise directed by the Contracting Officer, in writing, the Corporation shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Corporation with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Corporation may with the Contracting Officer's approval settle any such action or claim, shall effect at the Contracting Officer's request an assignment and subrogation in favor of the Government of all the Corporation's rights and claims (except those against the Government) arising out of any such action or claim against the Corporation, and, if required by the Contracting Officer, shall authorize representatives of the Government to settle or defend any such action or

claim and to represent the Corporation in, or to take charge of, any action. If the settlement or defense of an action or claim against the Corporation is undertaken by the Government, the Corporation shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Corporation is not covered by a policy of insurance, the Corporation shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith; and in such event the defense of the action shall be at the expense of the Government: **Provided, however,** That the Government shall not be liable for such expense to the extent that it would have been compensated for by insurance which was required by law or by the written direction of the Contracting Officer, but which the Corporation failed to secure through its own fault or negligence.

APPENDIX N

KRAMER, JOHNSON, RAYSON, McVEIGH & LEAKE
ATTORNEYS AT LAW
Post Office Box 629
Knoxville, Tennessee 37901

December 3, 1984

Mr. Ramsey Leathers
Clerk
Supreme Court
State of Tennessee
Nashville, TN 37219

Dear Mr. Leathers:

Re: Union Carbide Corporation v.
Lamar Alexander, et al.
Case No. 84-28-I

As you and the Supreme Court Justices may recall, I appeared before the Court on October 2, 1984, and argued the above-captioned case on behalf of the appellee, Union Carbide Corporation.

In the course of the oral argument, reference was made by the appellants to a franchise tax proceeding before the California State Board of Equalization involving Union Carbide. (*Appeal of Union Carbide Corporation,* Calif. Tax Reporter CCH) ¶ 440-813). Responding to that reference, I informed the Court of what Union Carbide was planning to do with respect to the record in the California proceeding and that the Court would be informed by December 1, 1984 of the action taken by Union Carbide.

Since a decision has now been rendered by this Court and the issues resolved in the above-captioned case, it seems that any further discussion or examination of the California proceeding would be inappropriate in the Tennessee Supreme Court, and for this and other related reasons, no action has been taken by Union Carbide at this time. If the Court still has any interest in what action, if

any, is taken by Union Carbide with respect to the California proceeding, I would appreciate hearing from you.

Yours very truly,

/s/ Jackson C. Kramer

JCK:nm

cc: Mr. Mike Lawson
Mr. George John Keto
Mr. Charles L. Lewis
Mr. G. Wilson Horde

RULE 60.02
TENNESSEE RULES OF CIVIL PROCEDURE

60.02 Mistakes; Inadvertence; Excusable Neglect; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion a prescribed in these rules or by an independent action.